TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 272

Andrew W. Mellon,
~~JAMES C. DAVIS~~, DIRECTOR GENERAL, AGENT U. S. RAILROAD ADMINISTRATION (GRAND RAPIDS AND INDIANA RAILROAD), APPELLANT

vs.

MICHIGAN TRUST COMPANY, RECEIVER OF RATHBONE MANUFACTURING COMPANY

APPEAL FROM AND ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED FEBRUARY 10, 1925
CERTIORARI GRANTED APRIL 13, 1925

(30862)

3466

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 897

JAMES C. DAVIS, DIRECTOR GENERAL, AGENT U. S. RAILROAD ADMINISTRATION (GRAND RAPIDS AND INDIANA RAILROAD), APPELLANT

vs.

MICHIGAN TRUST COMPANY, RECEIVER OF RATH-BONE MANUFACTURING COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Western District of Michigan	1	1
Bill of complaint	1	1
Answer	7	5
Extract from order appointing receiver	8	5
Proof of claim	10	7
Affidavit of J. M. Metheany	14	10
Supplementary proof of claim	16	11
Extract from master's report	18	12
Receiver's objections to Lawrence report	20	14
Claimant's answer to objections	22	14
Exceptions to master's report	24	16
Stipulation as to insolvency	26	18
Order overruling exceptions	26	18
Petition for and order allowing appeal	27	18
Assignments of error	27	19
Citation and service [omitted in printing]	29	20
Præcipe	30	20
Order extending time	31	21
Clerk's certificate	32	21
Proceedings in U. S. C. C. A. for Sixth Circuit	33	22
Appearance of counsel	33	22
Argument and submission	33	22
Decree	34	22
Opinion, Mack, J.	35	23
Petition for and order allowing appeal	43	29
Assignment	44	29
Clerk's certificate	49	31
Citation and service (omitted in printing)	49	31
Order allowing certiorari		31

In the United States District Court for the Western District of Michigan, Southern Division, in equity

Bill of complaint

Filed Dec. 6, 1919

To the District Court of the United States for the Western District of Michigan, Southern Division, in equity:

White Sewing Machine Company, a corporation organized under the laws of the State of Ohio, and a resident of the city of Cleveland in the State of Ohio, and a citizen of the State of Ohio, and William G. Renwick, of Chicago, Illinois, a citizen of the State of Illinois, in their own behalf, and in behalf of such other creditors of the defendant hereinafter named, and other persons in interest, as shall elect to join in the prosecution of this suit or in the benefits of this suit, bring this, their bill of complaint, against Rathbone Manufacturing Company, of the city of Grand Rapids, Michigan, a corporation organized under the laws of the State of Michigan, and a citizen of the State of Michigan, and a resident of the Western District and Southern Division thereof, defendant herein, and thereupon plaintiffs complain and say:

I

Plaintiff White Sewing Machine Company, is a corporation under the laws of the State of Ohio, and has its principal office and place of business at Cleveland in said State of Ohio, and has for many years last past and during that time it has been and now is a citizen of said State of Ohio. Plaintiff William G. Renwick, resides in Chicago, in the State of Illinois, where he has resided for many years last past, and during that time he has been and now is a citizen of said State of Illinois.

The defendant Rathbone Manufacturing Company, is a corporation organized and existing under and by virtue of the laws of the State of Michigan and having its principal place of business
2 in the city of Grand Rapids, Kent County, Michigan, and is a citizen of the State of Michigan, and a resident of the Western District, Southern Division thereof, and of no other State or District within the meaning of the laws fixing and defining the jurisdiction of this honorable court. The principal business of defendant has for a long time past been and still is the manufacture and sale of gray iron castings.

II

Plaintiff White Sewing Machine Company is a creditor of defendant in the amount of $3,650.00, or thereabouts, for moneys ad-

vanced to defendant and for claims on open account against defendant, all incurred during the last six months or thereabouts, $650,000 or thereabouts of this amount is on open account and is past due and the balance is evidenced by the note of defendant which is now due. Plaintiff William G. Renwick is a creditor of defendant in the amount of $1,000.00 or thereabouts, for services rendered to the defendant during the last six months or thereabouts.

III

The authorized capital stock of defendant is $135,000, of which $75,000 is common stock and $40,000 preferred stock. Of this capital stock there is outstanding common stock to the amount of $60,000 and preferred stock to the amount of $27,060. During the past six years defendant has been doing a business of $100,000 or thereabouts per year, and it has a plant in which it can carry on a large and profitable business. During the last few months it has been doing a business of $12,000 per month, as plaintiffs are informed and believe. It employs at its plant from forty to fifty employees. During a considerable portion of the time during the last several years defendant has been conducting business at a substantial loss. It has borrowed from the banks in Grand Rapids and from its stockholders large sums of money to wit, over $100,000, in order to pay its merchandise accounts and other indebtedness and its losses in operation. Most of the paper representing this money borrowed has been endorsed or guaranteed by Alfred D. Rathbone III, one of the stockholders and directors, and the president of defendant, and such endorsement has been necessary in order to negotiate said paper. The said Alfred D. Rathbone III has refused and does refuse to make any further endorsements on the paper of defendant, so that it
3 is impossible for defendant to borrow further sums with which to meet its indebtedness both for moneys borrowed and its other indebtedness. The defendant has always relied upon said Rathbone to furnish it with money as aforesaid, and is without credit to procure additional sums elsewhere, and it is unable to pay its debts in the ordinary course of its business as persons in trade usually do and are required to do. Its cash on hand is only $100 or thereabouts, and it has practically no quick assets whatever. It has accounts receivable of $8,540 or thereabouts, but is unable to collect the same or any considerable portion thereof immediately.

IV

The indebtedness of defendant, exclusive of its indebtedness on account of capital stock, amounts to $140,000 or thereabouts, of which a large portion is now due and payable, and the balance, being represented by notes of the defendant, will fall due at various times within the near future. Defendant has no money with which to pay the said indebtedness and no means of raising the same. Plaintiffs

are informed and believe, and therefore aver on such information and belief, that as a going concern the value of the assets of the defendant exceeds the amount of its liabilities, but that a stoppage or interruption of its business would result in a very great depreciation of the value of its plant and assets, making it improbable that defendant could pay its debts.

V

Plaintiffs are informed and believe, and therefore on such information and belief aver, that various creditors of defendant are demanding payment of their indebtedness; that judgments have recently been taken against defendant in the aggregate of, to wit, $5,000, and that various other suits have been commenced against defendant for indebtedness aggregating, to wit, $5,000.00; that executions are threatened against the property of defendant on account of the said judgments; and that should the creditors of said defendant be allowed to proceed upon the various debts due and owing to them, in an endeavor to parcel out defendant's property among themselves, it would result in ruining the business of defendant and in a very great diminution of the value of the assets to
4 which creditors would have to look for payment, and would almost certainly result in the insolvency of defendant and in great loss to creditors. The assets of said company will be subject to attachment or execution, and in the event of forced sales would bring very much less than their fair and reasonable value, all of which would be of great detriment to plaintiffs and the other creditors of said defendant. From investigations which plaintiffs have made of the affairs of defendant, and from information which they have received in regard thereto, they believe, and therefore aver, that if the assets of defendant are properly handled and conserved by a receiver to be appointed by this court the creditors of said defendant can probably be paid in full, and that there is the possibility that there may be a surplus left for the stockholders; but that unless they are so handled and conserved there will probably be great loss and waste occasioned by litigation, stoppage of business, forced sales, and other causes which will result in the insolvency of defendant. That unless the business and property of defendant is taken possession of by this court and administered by a receiver, there is great danger that those creditors whose indebtedness is not yet due and who can not bring suit at this time are liable to lose the whole or a portion of their indebtedness. If plaintiffs should commence suit on their claims it would probably precipitate still other suits against defendant and result in the immediate closing of its business before either of them could recover judgment in said suit. That the claim of creditors who are citizens and residents of other States than the State of Michigan amount to considerably more than $3,000.

VI

The defendant has a well-established business in grey iron castings and is manufacturing and selling to various responsible concerns throughout the United States. Among others it is manufacturing and selling to plaintiff White Sewing Machine Co. legs for sewing machines. It is manufacturing and selling to Cheney Talking Machine Co. turntables and motor frames. It is manufacturing and selling to Advance-Rumely Co. and to Delta-Star Manufacturing Co. and others grey iron castings. Plaintiffs are informed, and on such information aver, that the business of said defendant is now being operated at a small profit and that in the opinion of plaintiffs it can be so operated under present conditions, and that its operation under present conditions is for the best interests of the defendant and of all defendant's creditors, in that a suspension of operations and the breaking up of the business would result in a great sacrifice of the assets of the defendant as hereinabove stated.

VII

The matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.

Plaintiffs therefore ask the aid of this court in the premises and pray as follows:

1. That said defendant Rathbone Manufacturing Company may full, true and perfect answer make, without oath, to all and singular the matters and things hereinbefore stated.

2. That an accounting may be had and taken between said defendant and its creditors and its assets marshalled and that the court determine what creditors are entitled to be paid therefrom respectively, and that plaintiffs and other creditors of said defendant may be paid what is justly due to them.

3. That defendant may be forthwith enjoined from receiving any debts due it and from paying or transferring any of its moneys and effects, except by order of this court, or from in any way interfering with the possession and operations of the receiver to be appointed in this cause.

4. That a writ of injunction may issue out of and under the seal of this court, to be directed to the said defendant, its officers, servants, and agents, and each and every of them, enjoining and restraining them and each of them from collecting and receiving any debts due to defendant, and from paying, selling, assigning, or transferring any of the estate, money or funds, lands, tenements, or effects of said defendant, or interfering with the receiver to be appointed in this cause.

5. That a receiver may be appointed for said defendant, with the usual powers of receivers in equity in such causes, including power to conduct the business of defendant for such time and in such manner as in the judgment of the court may be for the best interest of defendant's creditors.

6. That the assets of defendant and the rights of plaintiffs and the other creditors of said defendant may be ascertained, and that this court fully administer the funds and property of said
6 defendant, and enforce the liens and rights of all the creditors thereof as the same may be finally ascertained.

7. That the writ of subpoena to be directed to the said defendant may be issued out of this court and under the seal thereof, commanding it that at a certain time and under a certain penalty to be therein specified, it shall be and appear before this honorable court, then and there to answer the premises and to abide by the order and decree of the court herein.

8. That plaintiffs may have such other and further relief in the premises as the nature of the case may require and as may be agreeable to equity and good conscience.

And plaintiffs will ever pray, etc.

WHITE SEWING MACHINE CO.
By W. W. CHASE, *President.*
WM. G. RENWICK.

M. B. & H. H. Johnson
Solicitor and of Counsel for Plaintiffs.
1009 American Trust Bldg., Cleveland, Ohio.

[Sworn to by W. W. Chase and Wm. G. Renwick. Jurat omitted in printing.]

7 In United States District Court

Answer

Filed Dec. 6, 1919

Rathbone Manufacturing Company, the defendant above named, for answer unto the bill of complaint in said cause, says that the allegations therein contained are true; and it does hereby consent to the appointment of a receiver as in said bill of complaint prayed.

RATHBONE MANUFACTURING CO.
By A. D. RATHBONE,
President.

THOMAS P. BRADFIELD,
Solicitor and of Counsel for Defendant.
843 Michigan Trust Co. Bldg., Grand Rapids, Michigan.

8 In United States District Court

Extract from order appointing a receiver

Dec. 6, 1919

The Michigan Trust Company, a corporation organized under the laws of the State of Michigan, and having its office and principal

place of business in the city of Grand Rapids in said State, be and is hereby appointed receiver of said Rathbone Manufacturing Co., defendant herein, and of all its property and assets of every kind, real, personal, and mixed, wherever the same may be situated; and the said receiver is hereby vested with all the property and rights of every kind whatsoever and wherever situated, both legal and equitable, of said defendant; and is also vested with full power and authority to demand, sue for, collect, receive and take into its possession all the goods, chattels, rights, credits, moneys and
9 effects, lands and tenements, books, papers, choses in action, bills, notes, plants and equipment, and property of any and every kind and description belonging to said defendant, or to which it may be entitled; to collect the rents, issues, income, profits, and revenues of all such property, or accruing to defendant, and to institute suits at law or in equity for the recovery of any assets, property, damages or demands of said defendant, and to prosecute or defend any suits now pending against said defendant, and, subject to the supervision of this court, to compound and settle with any debtor or creditor of said defendant, or with persons having possession of any of its property, or in any way responsible at law or in equity to defendant or to said receiver, upon such terms and in such manner as said receiver shall deem just and beneficial to said defendant, and in case of mutual dealings between said defendant and any persons, to allow just set offs in favor of such persons in all cases in which the same ought to be allowed according to law and equity; and to sell, convey, and assign any and all of the real and personal estate of the said defendant, subject to the supervision and order of this court, and to hold all moneys and securities for money arising from such sale which it shall collect or receive by virtue of said office, subject to the order of this court; and the receiver is hereby further vested with all the usual rights and powers and made subject to all the usual duties of receivers in such cases; and is further authorized to employ as its attorneys and counsel the firm of Knappen, Uhl & Bryant, of Grand Rapids, Michigan.

And it is further ordered that the receiver be and is hereby authorized and directed, until the further order of this court, to continue the business of said defendant company without interruption and fill its contracts (other than the payment of indebtedness of said defendant) made by said defendant or the receiver thereof, until the further order of this court in the premises; to pay out all moneys coming into its hands from time to time as such receiver for the necessary supplies for the purposes aforesaid or for the rental of premises used in said business; to employ and pay all needful agents and servants, and generally to do all acts and things proper and necessary to be done to protect the property and assets of which it is hereby appointed receiver, and to continue the business as herein ordered, with leave to apply from time to time for instructions touching all and singular its rights, powers and duties in the premises.

In United States District Court

Proof of claim

10

Filed May 15, 1920

Schedule "A."

RATHBONE MANUFACTURING COMPANY

Grand Rapids, Michigan

To the Grand Rapids & Indiana Railroad, Dr.,

For freight, demurrage and switching charges on shipments as follows:

Date	W. B. No.	From—	To—	Articles	Weight	Rate	Amount
1/13/17	5111	Cincinnati, Ohio	Grand Rapids, Mich.	Iron	67200	$4.10	$132.00
2/15/17	1383	Louisville, Ky	Grand Rapids, Mich.	Iron	71680	4.40	140.80
3/ 8/17	4329	Hestead, Pa	Grand Rapids, Mich.	Coke	57600	2.50	72.00
3/24/17	3155	Louisville, Ky	Grand Rapids, Mich.	Iron	56000	4.40	110.00
3/27/17	2017	Derry I, Pa	Grand Rapids, Mich.	Coke	57200	2.50	71.50
4/16/17	2010	Vincennes, Ind	Grand Rapids, Mich.	Iron	57000	28.4	82.22
4/20/17	7056	Louisville, Ky	Grand Rapids, Mich.	Iron	56000	4.40	110.00
4/20/17	2017	Vincennes, Ind	Grand Rapids, Mich.	Iron	55800	2.84	70.74
4/24/17	3026	Pinmer, Pa	Grand Rapids, Mich.	Coke	62880	2.50	78.50
4/24/17	29	Toledo, Ohio	Grand Rapids, Mich.	Iron	83000	1.68	62.25
4/24/17	2017	Vincennes, Ind	Grand Rapids, Mich.	Iron	59300	2.84	74.80
4/26/17	2020	Vincennes, Ind	Grand Rapids, Mich.	Iron	58200	2.84	73.78
5/ 5/17	11615	Finley, Pa	Grand Rapids, Mich.	Coke	83700	2.50	104.63
5/13/17	491	Finley, Pa	Grand Rapids, Mich.	Coal	59600	2.50	74.50
5/14/17	14061	Grand Rapids, Mich	Pittsburgh, Pa	Drums	300	30.5	.92
5/24/17	2166	Cincinnati, Ohio	Grand Rapids, Mich	Riddles	100	L.	.45
5/31/17	1632	Grand Rapids, Mich	Lafayette, Ind	Casting	10	L.	.43
6/ 2/17	22	Cleveland, Ohio	Grand Rapids, Mich.	Machine	500	.37	1.85
6/12/17	8286	Waverly Tr., N. J	Grand Rapids, Mich.	Casters	450	50.4	2.16
6/18/17	2507	Louisville, Ky	Grand Rapids, Mich.	Iron	50000	4.40	110.00
6/25/17	20021	Grand Rapids, Mich	Clifton Forge, Va	Grates	75	L.	.37
6/31/17	21020	Grand Rapids, Mich.	Pittsburgh, Pa	Carboys	300	24.2	.73
7/16/17	0301	Grand Rapids, Mich.	New York, N. Y	Cans	200	75.6	1.51
7/16/17	19	Shirnock	Grand Rapids, Mich.	Sand	56800	1.84	52.26
7/25/17	35	Shamrock, Ohio	Grand Rapids, Mich.	Sand	56700	1.84	52.16
2/27/17	1967	Cincinnati, Ohio	Grand Rapids, Mich.	Facings	1390	.20	2.78
8/ 4/17	430	Grand Rapids, Mich	Brooklyn, Ohio	Carboys	200	22.1	.44
8/ 6/17	31	Pittsburgh, Pa	Grand Rapids, Mich.	Facing	980	22.1	2.19
8/ 9/17	285	Grand Rapids, Mich	Eddyville, Ia	Castings	40	82.3	.82
8/13/17	1890	Chicago, Ill	Grand Rapids, Mich.	Furnace	24000	12.6	30.24
8/22/17	5890	Topeka, Kansas	Grand Rapids, Mich.	Grate	210	100	2.10
8/30/17	33	Shinrock	Grand Rapids, Mich.	Sand	98100	1.84	90.25
8/30/17	15637	E. St. Louis, Ill	Grand Rapids, Mich.	Drum	30	L.	.68
8/31/17	2421	Louisville, Ky	Grand Rapids, Mich.	Iron	60000	4.40	117.86
9/ 7/17	7041	Grand Rapids, Mich	Brooklyn, Ohio	Carboys	170	36.8	.63
9/10/17	207	Michigan City	Grand Rapids, Mich.	Iron	62000	2.22.2	121.74
9/13/17	74	Follansbee, W. Va	Grand Rapids, Mich.	Steel	1345	22.1	2.97
9/21/17	927	Sturgis, Mich	Grand Rapids, Mich.	Sand	88000	121.4	88.00
9/20/17		Grand Trunk R. R	Rathbone Mfg. Co	Scrap	Switching		6.00
9/28/17	618	Hamilton, Ohio	Grand Rapids, Mich	Wire	100	.53	.53
10/ 1/17	4	E. Chicago, Ind	Grand Rapids, Mich	Acid	572	47	2.69
10/ 5/17	980	Chicago, Ill	Grand Rapids, Mich	Radiator	100	1.27	1.27
10/11/17	1	Lissle Gen, Pa	Grand Rapids, Mich.	Coke	52800	26.5	69.96
10/13/17	13132	Grand Rapids, Mich.	Brooklyn, Ohio	Drums	200	35.5	.71
10/14/17	12	Salem, Pa	Grand Rapids, Mich.	Coke	74800	26.5	99.11
10/16/17	728	Dayton, Ohio	Grand Rapids, Mich.	Grates	1170	.35	4.10
10/19/17	3472	Chicago, Ill	Grand Rapids, Mich.	Brushes	100	L.	.47
11/ 2/17	90	Grand Rapids, Mich.	Columbus, Ohio	Covers	15	167.5	1.68
						Tax.	.05
11/ 5/17	802	Buffalo, N. Y	Grand Rapids, Mich.	Grates	100		.61
						Tax.	.02
11/12/17	89	Grand Rapids, Mich.	Leonardo, N. J	Castings	20	91.5	.92
						Tax.	.03
11/24/17	1053	Grand Rapids, Mich.	Canton, Ohio	Shanks	40	.57	.57
						Tax.	.02
12/ 8/17	5	Delhi, Ohio	Grand Rapids, Mich.	Sand	49700	2.60	49.70
						Tax.	1.49

Date	W. B. No.	From—	To—	Articles	Weight	Rate	Amount
12/12/17	1703	Chicago, Ill	Grand Rapids, Mich	Grates	100	$0.47	$0.47
						Tax.	.01
12/15/17	517	Grand Rapids, Mich	Hobbs, Indiana	Castings	30	54	.51
						Tax.	.02
12/17/17	17017	Grand Rapids, Mich.	Grasselli, Ind	Carboys	90		.47
						Tax.	.01
12/21/17	313	Seymour, Indiana	Grand Rapids, Mich.	Sand	58500	202.2	58.50
						Tax.	1.76
12/28/17	881	Grand Rapids, Mich.	Cuba, N. D	Fireplaces	300	112	4.36
						Tax.	.10
1/ 5/18	165	Cincinnati, Ohio	Grand Rapids, Mich	Facing	2500	.27	6.75
				Shovels, etc.	125	.339	.42
				Laddle, etc.	115	.54	.62
						Tax.	.24
1/ 8/18	203	Dubuque, Ia	Grand Rapids, Mich	Flask	310	44.5	1.38
						Tax.	.04
1/11/18	889	Chicago, Ill	Grand Rapids, Mich	Scale	1200	40	4.80
						Tax.	.14
1/12/18	5662	Clare, Ohio	Grand Rapids, Mich				2.00
					Recon-sign-ing.		
1/19/18		W. O. Hughart	Rathbone Mfg. Co		Switch-ing.		4.12
1/21/18	560	Richmond, Ind	Grand Rapids, Mich	Pig iron	64960	105.8	30.68
						230.2	66.76
						Tax.	2.92
2/ 8/18	363	Cincinnati, Ohio	Grand Rapids, Mich	Facing	1270	27	3.43
						Tax.	.10
2/11/18	1031	Grand Rapids, Mich.	Jamesport, Mo	Fireplace	225	99	2.23
						Tax.	.07
2/ 8/18	250	Muskegon, Mich	Grand Rapids, Mich	Iron	61400	100	27.41
						Tax.	.74
						R/C.	5.09
2/ 9/18	269	Richmond, Ind	Grand Rapids, Mich.	Iron	109760	98.1	48.07
						237.9	116.37
						Tax.	4.94
2/13/18	454	Richmond, Ind	Grand Rapids, Mich			R/C.	2.00
2/15/18		Grand Rapids, Mich.	Rathbone Mfg. Co	Iron demur-rage.			2.00
2/19/18	701	Grand Rapids, Mich.	Ft. Collins, Col	Castings	40	157	1.37
						Tax.	.03
2/22/18	22025	Grand Rapids, Mich.	Punxsutawney, Pa	Fireplace	240	.73	1.75
						Tax.	.03
2/23/18	23048	Grand Rapids, Mich.	Ft. Collins, Col	Fireplace	200	182	3.64
						Tax.	.11
3/ 1/18	16	McGibson, Ind	Grand Rapids, Mich	Facing	729	23.5	1.71
						Tax.	.05
3/12/18	12042	Grand Rapids, Mich.	Forest Raleigh, N. C	Damper	40	110	1.10
						Tax.	.03
3/16/18	235	Sidney, Ohio	Grand Rapids, Mich	Frame	100		.81
						Tax.	.02
3/22/18		Grand Rapids, Mich.	Rathbone Mfg. Co	Iron demur-rage.			4.00
3/22/18		Grand Rapids, Mich.	Rathbone Mfg. Co	Iron demur-rage.			2.00
3/26/18	1582	Cincinnati, Ohio	Grand Rapids, Mich	Siloun	780	36	2.08
						Tax.	.06
3/29/18	7282	Minneapolis, Minn	Grand Rapids, Mich	Howe	60	M.	.93
						Tax.	.03
4/ 1/18	1034	Grand Rapids, Mich.	Mills, N. Mexico	Grate	90	179	1.79
						Tax.	.05
4/ 1/18	1059	Grand Rapids, Mich.	Lenexa, Kan	Grate	90	116	1.16
						Tax.	.03
4/13/18	466	Grand Rapids, Mich.	Rantorel, Ill	Mise	140	L.	.54
						Tax.	.02
4/16/18	1450	Gibson, Indiana	Grand Rapids, Mich.	Grate	225	42.2	3.12
						Tax.	.09
4/17/18	609	Cincinnati, Ohio	Grand Rapids, Mich.	Grate	50	54	.27
				Facing	1200	27	3.24
						Tax.	.11
4/17/18	284	Duluth, Minn	Grand Rapids, Mich.	Fireplace		75	.93
						Tax.	.03
4/29/18	5200	Chicago, Ill	Grand Rapids, Mich.	Iron	94080	4.15	236.43
					R/C.		2.00
					Tax.		7.15
					Tax.		3.85
4/30/18	10026	E. St. Louis, Ill	Grand Rapids, Mich.	Iron	64900	4.40	128.40
5/ 6/18	42	Rockwood, Tenn	Grand Rapids, Mich.	Iron	70400	4.15	145.25
					V. chgs.		3.00
					Tax.		4.45
5/13/18	1872	Dayton, Ohio	Grand Rapids, Mich.	Grate	100	.53	.53
						Tax.	.02
5/16/18	45	Rockwood, Tenn	Grand Rapids, Mich.	Iron	87360	3.95	154.05
						Tax.	4.62

Date	W. B. No.	From—	To—	Articles	Weight	Rate	Amount
5/17/18	53	Rockwood, Tenn...	Grand Rapids, Mich.	Iron.....	69440	$3.95	$122.45
						Tax.	3.67
5/17/18	52	Rockwood, Tenn...	Grand Rapids, Mich.	Iron.....	67200	3.95	118.50
						Tax.	3.56
5/24/18	1427	Grand Rapids, Mich.	Orangeburg, S. C....	Grates.....	50	152	1.52
						Tax.	.05
5/25/18	2041	Frankford, Pa.....	Grand Rapids, Mich.	Emery.....	640	42.5	2.72
						Tax.	.08
5/28/18	1822	Cincinnati, Ohio....	Grand Rapids, Mich.	Facing.....	1190	27	3.21
						Tax.	.10
5/31/18		Grand Rapids, Mich.	Rathbone Mfg. Co...	Iron demurrage.			3.00
						Tax.	.09
6/ 7/18	1018	Cincinnati, Ohio....	Grand Rapids Mich.	Carboys....	650	.54	3.51
						Tax.	.11
6/14/18	2161	Cincinnati, Ohio....	Grand Rapids, Mich.	Crates.....	100	.35	.35
						Tax.	.01
6/19/18		Grand Rapids, Mich.	Rathbone Mfg. Co...	Coke demurrage.			6.00
						Tax.	.18
6/20/18	1850	Kalamazoo, Mich....	Grand Rapids, Mich.	Heads.....	20	L.	.41
						Tax.	.01
7/ 3/18	175	Grand Rapids, Mich.	Warren, Minn.....	Misc.....	75	L.	1.69
						Tax.	.05
7/10/18	645	Orient Wks. Pa....	Grand Rapids, Mich.	Coke.....	76700	330	126.56
						Tax.	3.80
7/18/18	232	Grand Rapids, Mich.	Hamburg, N. J.....	Castings....	30	L.	1.14
						Tax.	.03
7/21/18	1780	Orient Wks. Pa....	Grand Rapids, Mich.	Coke.....	55000	330	90.75
						Tax.	2.72
7/21/18	183	Orient Wks., Pa....	Grand Rapids, Mich.	Coke.....	81500	330	134.48
						Tax.	4.03
7/29/18	29018	Grand Rapids, Mich.	New York, N. Y....	Irons.....	40	L.	1.04
						Tax.	.03
4/ 2/19		P. L. Car 561540....	.....	Car service			6.00
						Tax.	.18
9/22/19	1117	Tonawanda, N. Y....	Grand Rapids, Mich.	Iron sup. bill			.37
9/26/19	1466	Tonda, N. Y.....	Grand Rapids, Mich.	Iron sup. bill			10.51
Total.....							$3,953.46

13 Schedule "B."

RATHBONE MANUFACTURING CO., GRAND RAPIDS, MICH.

To the Grand Rapids & Indiana Railroad, Dr.

To value of 33,300 pounds of pig iron unloaded and converted by Rathbone Manufacturing Co. from car P. L. E. 45303, on, to wit, September 27th, 1919, at Grand Rapids, Michigan, which said pig iron so unloaded and converted by Rathbone Manufacturing Co. was at the time thereof the property of the Donner Steel Company of Buffalo, N. Y., and was then within the custody and control of Walker D. Hines, Director General of Railroads, United States Railroad Administration, Grand Rapids & Indiana Railroad, under the provisions of an order bill of lading, by the terms of which the Rathbone Manufacturing Company were entitled to said pig iron only upon the purchase price thereof and the surrender of the said order bill of lading therefor, and which said pig iron the said Rathbone Manufacturing Company removed from said car and converted without surrender of the said bill of lading, and by reason whereof, the said Director General of Railroads, Grand Rapids & Indiana Railroad, became liable to said Donner Steel Company for the value of said pig iron and on February 23, 1920, paid the claim of the said Donner Steel Company made on account of the conversion thereof in the amount of $527.74. $527.74

14 In United States District Court

Affidavit of J. M. Metheany

Filed May 15, 1920

STATE OF MICHIGAN,
County of Kent, ss:

On the 14th day of May, A. D. 1920, came J. M. Metheany, of Grand Rapids, in the county of Kent, State of Michigan, who, being duly sworn, deposes and says that he is auditor, Grand Rapids & Indiana Railroad, Walker D. Hines, Director General, United States Railroad Administration, and makes this affidavit for and on behalf of Walker D. Hines, Director General, United States Railroad Administration, Grand Rapids & Indiana Railroad, and is authorized so to do, that the above-named Rathbone Manufacturing Co., against which the bill of complaint in this cause was filed, for the appointment of a receiver, and for other relief, at and before the filing of said bill of complaint and the appointment of a receiver herein, was and still is justly and truly indebted to said Walker D. Hines, Director General, United States Railroad Administration, Grand Rapids & Indiana Railroad, in the sum of four thousand five hundred eighty-one dollars and twenty cents ($4,581.20), upon certain open accounts of which true statements are hereunto annexed, set forth on Schedule "A"; that said debt became due on the twenty-sixth day of September, A. D. 1919, and draws interest at the rate of five per cent per annum from September 29, 1919; that the debt recited in Schedule "B" matured on and draws interest at the rate of five per cent per annum from September 28, 1919; that no part of said debt has been paid; that there are no set-offs or counterclaims to the same; that said claimant, Walker D. Hines, Director General, United States Railroad Administration, Grand Rapids & Indiana R. R., has not, nor has any person by his order, or to the knowledge or belief of said deponent for his use, had or received any manner of security for said debt whatever, and that no note has been received for said account, nor has any judgment been rendered thereon. The consideration of said debt was freight, demurrage, and switching charges on shipments on merchandise to and from Grand Rapids, Michigan, received and shipped by Rathbone Manufacturing Company as indicated on the statement, Schedule "A," and for the conversion of 33,300 pounds of pig iron on, to wit, September 27, 1919, as set forth on statement Schedule "B."

Claimant claims priority over other creditors on the indebt-
15 edness recited in Schedule "B" for the reason that the merchandise there referred to, when converted, was not the property of the Rathbone Manufacturing Co., and it belonged to the Donner Steel Co., and claimant, the carrier in custody, and was

fraudulently and wrongfully converted by the Rathbone Manufacturing Co.

The said claimant desires to come into and participate in this proceeding, and share with the complainant therein, in pursuance of the order made by the court on January 9th, 1920.

J. M. METHEANY.

Subscribed and sworn to before me this 14th day of May, A. D. 1920.

[SEAL.] A. L. PARMELEE,
Notary Public, Kent County, Michigan.

My commission expires June 19, 1922.

[File indorsement omitted.]

16 *Supplementary proof of claim*

Filed May 17, 1920

STATE OF MICHIGAN,
County of Kent, ss:

J. M. Metheany, being duly sworn, deposes and says that he is auditor of the Grand Rapids & Indiana Railroad, Director General, United States Railroad Administration, and makes this affidavit for and on behalf of said Director General, United States Railroad Administration, Grand Rapids & Indiana Railroad, and is authorized so to do.

That on the 15th day of May, 1920, said Director General, United States Railroad Administration, Grand Rapids & Indiana Railroad, filed in this cause with John S. Lawrence, master in chancery, proof of claim of the said Director General of Railroads, United States Railroad Administration, Grand Rapids & Indiana Railroad, sworn to by this deponent, against the above-named Rathbone Manufacturing Company, against which the bill of complaint in this cause was filed, for appointment of receiver and for other relief; that the amount of such claim as filed is $4,581.20 upon certain open accounts, true statements of which were annexed to the proof of claim referred to and filed as stated, which said indebtedness became due on the 26th day of September, 1919, and draws interest at the rate of five per cent per annum from September 29, 1919, no part of which indebtedness has been paid.

That the indebtedness for which claim was made in said proof of claim and the consideration therefor was freight, demurrage, and switching charges on shipments of merchandise to and from Grand Rapids, Michigan, received and shipped by the Rathbone Manufacturing Company on various dates between January 13, 1917, and September 26, 1919, inclusive, and for the value of 33,300 pounds of pig iron unloaded and converted by Rathbone Manufacturing Company on car P. L. E. 45303, on, to wit, September 27th, 1919, at Grand Rapids, Michigan, which pig iron was then within the custody and control of the Director General, United States Railroad Administration, Grand Rapids and Indiana Railroad; reference is

hereby made for greater certainty to the schedules of such in-
17 debtedness and the particulars thereof set forth in said proof of claim heretofore filed by this claimant May 15, 1920, the same being made a part hereof.

That the said Director General in said proof of claim so filed May 15, 1920, claimed priority over other creditors of said Rathbone Manufacturing Company on the indebtedness set forth in Schedule B of the said proof of claim, viz, the amount of $527.74, which accrued on account of the conversion of the 33,300 pounds of pig iron referred to.

Said Director General, United States Railroad Administration, Grand Rapids and Indiana Railroad, now supplements the proof of claim, filed May 15, 1920, with the additional claim that the entire indebtedness schedules, itemized, and recited in said proof of claim, filed May 15, 1920, amounting to the sum of $4,581.20 with interest thereon at five per cent per annum, from September 29, 1919, is entitled to priority and preference over all and any other indebtedness of said Rathbone Manufacturing Company and is entitled to priority of payment over the indebtedness of any other creditors of said Rathbone Manufacturing Company for the following reasons:

The said indebtedness recited in both Schedules A and B of said proof of claim, filed May 15, 1920, and to which this is a supplement, is an indebtedness due to the United States of America.

Deponent therefore makes and files this affidavit in support of and as a supplement to the proof of claim of the Director General of Railroads, United States Railroad Administration, Grand Rapids & Indiana Railroad, referred to and filed May 15, 1920, and claims priority and preference for the said claims of the said Director General of Railroads, United States Railroad Administration, Grand Rapids and Indiana Railroad, for the reasons therein and herein set forth. And this claimant desires to come into and participate in this proceeding and share with the complainant therein in pursuance of the orders of this court and in the proportions to which it is entitled by virtue of its claim of priority and preference.

J. M. METHEANEY.

Subscribed and sworn to before me this 17th day of May, A. D. 1920.

[SEAL.] A. L. PARMELEE,
Notary Public, Kent County, Mich.

My commission expires June 19, 1922.
18 [File indorsement omitted.]

In United States District Court

Extracts from report of Kirk E. Wicks, master in chancery

Filed May 17, 1923

2. That on February 3, 1923, I received from Hon. John S. Lawrence, master in chancery, the claims of Alfred D. Rathbone, III, Nos. 147 and 149, and the claims of Orcelia A. Rathbone, Nos. 150 and 151, together with transcript of testimony and certain exhibits

relating thereto, the original receipt for which is attached to the report of said John S. Lawrence, master in chancery.

3. That hearings were held, further testimony taken on the claims of Alfred D. Rathbone, III, and Orcelia A. Rathbone, and they were allowed by me as follows:

Alfred D. Rathbone, III	$120,095.93
Orcelia A. Rathbone	35,758.39

19 6. That within the time limited for filing objections to said reports and allowances, and on April 18, 1923, the receiver filed objections to the allowance of claim No. 77, Director General of Railroads (Grand Rapids & Indiana R. R. Co.), as a preferred claim, as appears on page 10 of the report of said John S. Lawrence, master in chancery. That on May 9, 1923, the claimant filed its answer to said objections, together with brief of E. M. Davis, Esquire, its counsel, and on May 13, 1923, Messrs. Knappen, Uhl & Bryant, counsel for receiver, filed their brief in support of the receiver's objections, all of which are hereto annexed, made a part hereof, and marked Exhibits "C," "D," and "E." That said matter was considered by me, and on May 14, 1923, I filed my opinion whereby the allowance of the claim as a preferred claim was set aside and the claim allowed as an ordinary claim for $4,522.95, which opinion is attached hereto, made a part hereof, and marked Exhibit "F."

RATHBONE MANUFACTURING CO.

Schedule No. I. Preferred claims

Total preferred claims allowed as per report of Hon. John S. Lawrence, master in chancery (p. 10)	$4,957.96
Less claim #77, Director General of Railroads (Grand Rapids & Indiana R. R. Co.), transferred to Schedule No. II, ordinary claims	4,522.95
(See opinion filed May 14, 1923) Net amount preferred claims	$435.01

A portion of the above claim #77, amounting to $3,953.46, was for outstanding freight charges; the remainder, $527.74, was for steel which claimant had in charge for transportation which was wrongfully appropriated and used by the Rathbone Mfg. Co.

20 RATHBONE MANUFACTURING CO.

Schedule No. II. Ordinary claims

Total ordinary claims allowed as per report of Hon. John S. Lawrence, master in chancery (p. 17)	$60,949.98
To which amount is added the following claims:	
#77, Director General of Railroads (Grand Rapids & Indiana R. R. Co.) transferred from Schedule I, preferred claims	4,522.95
#147, to #149, Alfred D. Rathbone, 3rd, Grand Rapids, Michigan	120,095.93
#150 & 151, Orcelia A. Rathbone, Grand Rapids, Michigan	35,758.39
Total	$221,327.25
Less claim #134, G. A. Wolf, Grand Rapids, Michigan, withdrawn (see withdrawal filed April 27, 1923)	100.64
Net amount ordinary claims	$221,226.61

In United States District Court

Receiver's objections to report of master in chancery, John S. Lawrence

April 18, 1923

Now comes the Michigan Trust Company, receiver of the above-named defendant, by its attorneys, Knappen, Uhl & Bryant, and objects to the draft of report of John S. Lawrence, master in chancery, as filed herein and approved by Kirk E. Wicks, master
21 in chancery on April 16, 1923, in the following particulars, namely:

1. The claim of Director General of Railroads, operating the Grand Rapids & Indiana Railroad Company, in the sum of four thousand four hundred eighty-one and 20/100 ($4,481.20) dollars should have been allowed as an ordinary claim and is not entitled to preference.

2. Page 10 of said report, viz: A list of allowance of preferred claims should be corrected to exclude said claim of Director General, namely, claim No. 77, which, together with interest, appears in said schedule of preferred claims in the sum of four thousand five hundred twenty-two and 95/100 ($4,522.95) dollars.

3. Said claim of Director General in the sum of four thousand five hundred twenty-two and 95/100 dollars ($4,522.95) should be allowed as an ordinary claim.

4. Paragraph 8 of said report at page 4 should be corrected in the following respect, namely:

Paragraph 8 states that the receiver withdrew its objections to certain listed claims, including said claim of Grand Rapids & Indiana Railroad Company, whereas your receiver states the fact to be that said objections of receiver to said claim were never formally withdrawn, as by reference to the files and reports herein more clearly appear.

THE MICHIGAN TRUST COMPANY,
Receiver of Rathbone Manufacturing Co.
By KNAPPEN, UHL & BRYANT,
Its Attorneys.

22 *Answer of Federal agent and Director General of railroads (Grand Rapids & Indiana railroad), to the receiver's objections to the report of the master in chancery*

The Federal agent designated by the President and the Director General of Railroads, United States Railroad Administration

(Grand Rapids & Indiana Railroad, by E. M. Davis, its attorney, comes and says in answer to the objections of the receiver to the draft of report John S. Lawrence, master in chancery, filed in this cause and approved by Kirk E. Wicks, master in chancery, April 16, 1923:

1. It denies the first objection and specifically says and urges to the master that the report of master in chancery, John S. Lawrence, of date April 16, 1923, approved by Kirk E. Wicks, master in chancery, upon the same date, allowing the claim of the Director General of Railroads, Grand Rapids and Indiana Railroad, of the sum of four thousand four hundred and eighty-one dollars twenty-one cents ($4,481.21) should not be amended nor revoked, for the reason that the said claim is entitled to priority in that it is a claim in favor of the United States Government. It is not a so-called "ordinary claim."

2. It denies that page 10 of the report referred to, which is a list of allowances of preferred claims, should be corrected in order to exclude the claim of the Director General (claim No. 77), which together with interest, appears in said schedule of preferred claims in the amount of four thousand five hundred twenty-two dollars ninety-five cents ($4,522.95).

3. It is denied that the claim of the Director General referred to should be allowed as an ordinary claim; it is and should be allowed as a preferred and priority claim by virtue of United States statute.

4. It is denied that paragraph 8 of the said report, at page 4, should be corrected in the respect urged by the receiver by its attorneys so that it might appear that objections of the receiver to the claim were withdrawn; and in this connection claimant shows that its attorney was advised by attorneys for the receiver under date of September 27, 1921, following the filing by claimant's
23 attorney of a brief in support of its claim under date of September 19, 1921, as follows:

"We have received your brief in the above case and have examined the law on this question and are of opinion that the railroad is entitled to priority as claimed herein.

"The above claim will therefore be allowed without further hearing."

following receipt of which communication attorney for the claimant advised John S. Lawrence, master in chancery, thereof and attorneys for the receiver did not present further objections until after date of April 18, 1923.

In support of its answer to the objections of the attorneys for the receiver to its claim, claimant's attorney submits the attached

brief, copy of which will be served upon the attorneys for the receiver.

DIRECTOR GENERAL, UNITED STATES RAILROAD ADMINISTRATION (GRAND RAPIDS AND INDIANA RAILROAD).
JAMES C. DAVIS,
Federal Agent.
By E. M. DAVIS,
Its Attorney.

8. Exceptions of claimant James C. Davis, Director General, to that portion of the report of the master in chancery relating to claim No. 77 of the Director General of Railroads (Grand Rapids & Indiana Railroad).

24 In United States District Court

Exceptions to master's report

Filed June 4, 1923

Now comes the above named claimant, James C. Davis, Director General and Agent, designated by the President, and excepts to that portion of the report of the master in chancery filed in this cause May 17, 1923, as follows:

"6. That within the time limited for filing objections to said reports and allowances, and on April 19, 1923, the receiver filed objections to the allowance of claim No. 77, Director General of Railroads (Grand Rapids & Indiana R. R. Co.), as a preferred claim, as appears on page ten of the report of said John S. Lawrence, master in chancery. That on May 9, 1923, the claimant filed its answer to said objections, together with brief of E. M. Davis, Esquire, its counsel, and on May 12, 1923, Messrs. Knappan, Uhl, and Bryant, counsel for receiver, filed their brief in support of the receiver's objections, all of which are hereto annexed made a part hereof and marked Exhibits 'C,' 'D,' and 'E.' That said matter was considered by me, and on May 14, 1923, I filed my opinion whereby the allowance of the claim as a preferred claim was set aside and the claim allowed as an ordinary claim for $4,522.95, which opinion is attached hereto, made a part hereof, and marked Exhibit 'F.'"

For the following reasons:

1. The master in chancery held in his opinion and conclusion that the claim referred to is not one entitled to priority notwithstanding the fact that it is a claim due the United States Government.

2. Claimant bases its right to preference on the entire claim on section 3466 of the Revised Statutes of the United States, which provides:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The report and recommendation of the master in chancery is in error in the disallowance of this claim as a preferred claim under the authority of such statute. The allegations of the bill of complaint filed for institution of the proceedings establish insolvency of the Rathbone Manufacturing Company within the meaning of the law affording priority to the United States Government. The allegations of this bill of complaint are admitted by the answer of the Rathbone Manufacturing Company. The record of the receivership with this court discloses that at the time of the filing of the bill of complaint the Rathbone Manufacturing Company was insolvent and that it was at the date of the filing of the master's report insolvent. Notwithstanding this insolvency of the Rathbone Manufacturing Company, the master had erroneously refused to allow the claim of the United States Government as a priority, and his report and ruling should be set aside and an order entered allowing claimant's claim as entitled to priority.

3. Claimant asserted priority for $527.74 of the claim filed (see schedule B), for the reason that the merchandise there referred to was converted by the Rathbone Manufacturing Company. This claim of preference has not been passed upon by the master, and claimant insisted that it is entitled to preference because of the fraudulent and unlawful act of the Rathbone Manufacturing Company in converting to its uses property within its custody.

Claimant prays that this court will fix a place and time for hearing its exceptions and for consideration of its claims and for review of the master's recommendation, and also for an order allowing to claimant the entire amount of its claim as presented as one entitled to priority because due the United States Government.

E. M. DAVIS.
Attorney for Claimant.

CLAPPERTON & OWEN,
Of Counsel.

26 In United States District Court

Stipulation as to insolvency

Filed Aug. 1, 1923

It is hereby stipulated and agreed by and between the receiver of said above-named defendant corporation and the said claimant, by their respective attorneys, that at the time for the filing of the petition for the appointment of a receiver of said defendant corporation the said corporation was, in fact, insolvent in that the aggregate of all its property and assets was not at a fair valuation sufficient in amount to pay the debts of said corporation, the said receiver, however, not admitting that said insolvency was at that time shown by the books of said defendant, or was then known by defendant or by plaintiffs. Dated: August 1st, 1923.

KNAPPER, UHL & BRYANT,
Attorneys for Receiver.
CLAPPERTON & OWEN,
Attorneys for Director General of Railroads.

In United States District Court

Order overruling exceptions

September 15, 1923

This cause having come on to be heard upon the exceptions of James C. Davis, Director General, agent (United States Railroad Administration, Grand Rapids & Indiana Railroad), to the report of the master in chancery relating to the claim of said James C. Davis, Director General, agent, after argument thereof, and upon due consideration thereof, it is

Ordered, that the exceptions of said claimant be and are hereby overruled and that the report of the master in chancery be and is hereby confirmed, and that claimant be and is hereby allowed the benefit of an exception to this order.

C. W. SESSIONS,
United States District Judge.

Dated September 13, 1923.

27 In United States District Court

Petition for appeal

Filed Oct. 15, 1923

The above-named claimant, James C. Davis, Director General, agent, United States Railroad Administration, Grand Rapids & Indiana Railroad, conceiving himself aggrieved by the order entered

on September 15, 1923, in the above-entitled proceeding, doth hereby appeal from said order to the Circuit Court of Appeals of the United States for the Sixth Circuit, and he prays that this, his appeal, may be allowed and that a transcript of the records and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Circuit Court of Appeals of the United States for the Sixth Circuit.

CLAPPERTON & OWEN,
Attorneys for Claimant and Appellant, 1019 Michigan Trust Building, Grand Rapids, Mich.

Dated October 13, 1923.

WESTERN DISTRICT OF MICHIGAN:

The foregoing claim of appeal hereby is allowed.

A. C. DENISON,
U. S. Circuit Judge.

Oct. 15, 1923.

In United States District Court

Assignments of error

Filed Oct. 15, 1923

Now comes James C. Davis, Director General, agent (United States Railroad Administration, Grand Rapids & Indiana Railroad), plaintiff in error, and herein makes and files this his assignments of error:

I. That the District Court erred in its order of September 15th, 1923, overruling the exceptions of said claimant to the report of the master in chancery, and confirming the report of the master in chancery, for the following reasons:

28 1

What the claim of said James C. Davis, Director General, was and is a preferred claim within the meaning of section 3466 of the Revised Statutes of the United States and should be allowed as a preferred claim, with priority as to payment over the ordinary claims filed against said estate.

2

That said claim of said James C. Davis, Director General, is a preferred claim within the meaning of said section 3466 of the Revised Statutes of the United States for the reason that at the time of the filing of the bill of complaint in said suit of the White Sewing Machine Company versus the Rathbone Manufacturing Company said Rathbone Manufacturing Company was insolvent and has committed an act of bankruptcy within the meaning of

said section 3466 in that because of insolvency a receiver was put in charge of the said Rathbone Manufacturing Company.

3

That at the time of the filing of the bill of complaint the said Rathbone Manufacturing Company was insolvent and committed an act of bankruptcy within the meaning of the said section 3466, U. S. Revised Laws, in that being insolvent it applied for a receiver for its property.

4

That appellant asserted priority for $527.74 of the claim filed for the reason that the merchandise therein referred to was converted by the Rathbone Mfg. Co., and that this claim of preference was not passed upon by the master, although appellant is entitled to preference because of the fraudulent and unlawful acts of the Rathbone Manufacturing Company in converting to its use this property within its custody.

CLAPPERTON & OWEN,
Attorneys for Appellant.

Dated October 15th, 1923.

29 [Citation in usual form showing service on Knappen, Uhl & Bryant, omitted in printing.]

30 In United States District Court

Precipe in transcript of record

Filed Nov. 7, 1923

And now comes the Director General of Railroads, claimant and appellant in said cause, and hereby requests the clerk and court to procure the printing of the following documents as a transcript of the record of proceedings and papers, to be sent to the Circuit Court of Appeals on the claimant's appeal in the above-entitled cause.

1. Bill of complaint.
2. Answer of Rathbone Manufacturing Company, defendant.
3. Extract from order appointing receiver.
4. Copy claim as filed.
5. Extracts from report of Kirk E. Wicks, master in chancery, dated May 17th, 1923.
6. Receiver's objections to the report of the master in chancery, John S. Lawrence, dated April 16, 1923, and approved by master in chancery, Kirk E. Wicks, as of the same date.
7. Answer of the Director General of Railroads to the receiver's objections, report of the master in chancery, April 16, 1923.
8. Exceptions of claimant James C. Davis, Director General, to that portion of the report of the master in chancery relating to

claim No. 77 of the Director General of Railroads (Grand Rapids & Indiana Railroad).

9. Stipulation as to insolvency of defendant at the time of filing petition bearing date August 1st, 1923.

10. Order overruling exceptions of claimant in confirming the report of the master in chancery.

11. Petition for appeal of Director General of Railroads, and allowance.

12. Assignments of error.

13. Præcipe.

We hereby agree that the above præcipe states fully the documents necessary for the record on appeal.

KNAPPAN, UHL & BRYANT,
Attorneys for Receiver.
CLAPPERTON & OWEN,
Attorneys for Director General of Railroads.

31 In United States District Court

Order extending time

Filed Nov. 12, 1923

The District Court of the United States for the Western District of Michigan. Southern Division in Equity

WHITE SEWING MACHINE COMPANY ET AL., PLAINTIFFS,
vs.
RATHBONE MANUFACTURING COMPANY, DEFENDANT. } No. 1908

In re James C. Davis, Director General of Railroads (Grand Rapids and Indiana Railroad), claimant and appellant

It appearing that the transcript on appeal in this matter will not be ready to go forward by the return day of the citation herein, it is ordered that the time for filing such transcript be and it hereby is, extended to and including the 24th day of November, A. D. 1923.

C. W. SESSIONS,
U. S. District Judge.

Dated November 12, 1923.

32 In United States District Court

Clerk's certificate

UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

I, Charles J. Potter, clerk of the United States District Court for the Western District of Michigan, do hereby certify that the within

and foregoing are true and compared copies of all those parts of the files and records in the within-entitled cause, which are specified in the joint præcipe of counsel for the respective parties, omitting such portions thereof as are required to be omitted by rule 15 of the United States Circuit Court of Appeals for the Sixth Circuit, to which I have attached the original citation and the original order extending time for filling the transcript in said cause, the whole constituting the transcript on appeal and made up pursuant to said præcipe of counsel.

Witness my hand and the seal of said district court at the city of Grand Rapids in said district and division, this 16th day of November, in the year of our Lord one thousand nine hundred and twenty-three.

CHAS. J. POTTER,
Clerk.

[SEAL.] By CHAS. L. FITCH,
Deputy.

33 In the United States Circuit Court of Appeals for the Sixth Circuit

Appearance of counsel

Filed Nov. 30, 1923

ARTHUR B. MUSSMAN,
Clerk of said Court:

Please enter my appearance as counsel for the appellant.

CLAPPERTON & OWEN,
Attorneys for Plaintiff.
E. M. DAVIS,
Of Counsel.

In United States Circuit Court of Appeals

Argument and submission

October 9, 1924

This cause is argued by Mr. G. W. Clapperton for the appellant and by Mr. Devere Bryant for the appellee, and is submitted to the court.

34 In United States Circuit Court of Appeals

Decree

Filed Nov. 10, 1924

Appeal from the District Court of the United States for the Western District of Michigan. This cause came on to be heard on

the transcript of the record from the District Court of the United States for the Western District of Michigan and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby, affirmed with costs.

35 In United States Circuit Court of Appeals, Sixth Circuit

JAMES C. DAVIS, DIRECTOR GENERAL, AGENT United States Railroad Administration (Grand Rapids & Indiana Railroad), appellant vs. THE MICHIGAN TRUST COMPANY, RECEIVER of Rathbone Manufacturing Company, appellee	Appeal from the District Court of the United States for the Western District of Michigan

Decided November 10, 1924

Opinion

Filed Nov. 11, 1924

Before DENISON and MACK, Circuit Judges, and SATER, District Judge.

MACK, Circuit Judge: This is an appeal from the decree of the District Court denying priority to the claim filed by the Director General for freight, demurrage, and switching charges in the distribution of the assets in the hands of the receiver in equity of the Rathbone Manufacturing Company.

The receiver had been appointed, with the consent of the company, on the usual creditor's bill alleging the inability of the company to pay its liabilities in due course. The bill did not allege insolvency in the bankruptcy sense; on the contrary, it alleged, on information and belief, that the going concern value of the defendant's assets exceeded the amount of its liabilities, and that if the assets of the company were properly handled and conserved by a receiver, creditors could probably be paid in full with a possible surplus for
36 stockholders. It is now admitted by stipulation that at the time of the appointment of the receiver the company was in fact insolvent in the bankruptcy sense, in that the aggregate of its property and assets at a fair valuation was then insufficient in amount to pay its debts; it is not admitted or shown, however, that at that time either the company or the plaintiff-creditor knew of such insolvency.

The claim of the Director General for priority is based upon section 3466 of the United States Revised Statutes, which reads as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

In U. S. v. Oklahoma, 261 U. S. 253, the State Bank Commissioner had taken over assets of a bank under a state law permitting such action if he should become satisfied of its insolvency in the sense of its inability to pay its depositors in ordinary course of business and to continue as a going banking concern. The Supreme Court, in denying the claim of the Government for priority in the payment of the assets in the hands of the bank commissioner, said:

"Section 3466, relied on by the Government, is a reenactment and extension of section 65, act of March 2, 1799, 1 Stat. 676; and the same or equivalent language, so far as the question here involved is concerned, is found in earlier statutes. Act of March 3, 1797, c. 20, sec. 5, 1 Stat. 515; also, act of May 2, 1792, c. 27, sec. 18, 1 Stat. 263; act of August 4, 1790, c. 35, sec. 45, 1 Stat. 169; act of July 31, 1789, c. 5, sec. 21, 1 Stat. 42. It has been considered in a number of cases in this court. The claim of the United States to the asserted priority rests exclusively upon the statute. No lien is created by it. It does not overreach or supersede any bona fide transfer of
37 property in the ordinary course of business. It establishes priority which is limited to the particular state of things specified. The meaning of the word 'insolvent,' used in the act and of the insolvency therein referred to, is limited by the language to cases where 'a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment,' etc. Mere inability of the debtor to pay all his debts in ordinary course of business is not insolvency within the meaning of the act, but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part. United States v. State Bank of North Carolina, 6 Pet. 29, 35; United States v. Fisher, 2 Cranch, 358, 390; United States v. Hooe, 3 Cranch, 73, 90; Prince v. Bartlett, 8 Cranch, 431, 433; Conard v. Atlantic Insurance Co., 1 Pet., 386, 439; Brent v. Bank of Washington, 10 Pet. 596, 611; Field v. United States, 9 Pet. 182, 201. Where the debtor is divested of his property in one of the modes specified in the act, the person who becomes invested with the title is made trustee for the United States and bound first to pay its debt out of the debtor's property. Beaston v. Farmers' Bank of Delaware, 12 Pet. 102, 133–135.

"The facts set forth in the complaint do not constitute an act of bankruptcy as defined by the Federal bankruptcy act (section 3a).

There is not alleged any conveyance to defraud, or preference through transfer or through legal proceedings, or general assignment for the benefit of creditors. Nor is the case within the meaning of the last clause of section 3a (4) "or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state * * *" The allegations do not show insolvency within the meaning of section 3466 or of the bankruptcy act.

* * * * * * *

"As insolvency within the meaning of section 3466 was not necessary for the taking of possession by the bank commissioner and is not shown to exist, and as no act of bankruptcy as defined by applicable Federal legislation on the subject of bankruptcies or as defined by any law of Oklahoma is shown to have been committed, and as the debtor bank was not divested of its assets in one of the modes specified in section 3466, the case is not within that section."

38 We proceed to a consideration of the questions raised or suggested by this record:

First. Does the phrase "because of insolvency," as used in the amendment of February 5, 1903, to section 3a (4) of the bankruptcy act, require that the appointment of a receiver in an ordinary creditor's suit be made solely, or at least in part, on the ground of a then existing insolvency as defined in the bankruptcy act, or does it suffice for the act of bankruptcy that such insolvency as so defined then exist irrespective of whether or not the appointment of the receiver was based thereon?

Prior to the amendment by which the last clause of subdivision 4 of section 3a was added thereto, this court held in Vaccaro v. Security Bank of Memphis, 103 Fed. 436 (see, too, 1 Collier Bankruptcy, 13th ed., p. 164, and cases cited), that the appointment of a receiver for an insolvent corporation was not equivalent to the making of "a general assignment for the benefit of creditors," the only act of bankruptcy then specified in subdivision 4. The authorities are in conflict in their construction of the amendment. The earlier cases deem it essential that the appointment be based in whole or in part upon such insolvency. In re William S. Butler & Co., 207 Fed. 705 (C. C. A. 1); in re Valentine Bohl Co., 224 Fed. 685 (C. C. A. 2). The later cases, however, consider the act of bankruptcy established by proof that the debtor was in fact insolvent, as defined in the bankruptcy act, at the time of the appointment of a receiver even though the order of appointment was made pursuant to allegations and findings of insolvency not as so defined but in the sense that the debtor was unable to pay his obligations in due course. Davis v. Pullen, 277 Fed. 650 (C. C. A. 1); Davis v. Miller-Link Lumber Co., 296 Fed. 649 (C. C. A. 5); Hilb v. American Smelting & Refining Co., 275 Fed. 384; Re Sedalia Farmers' Co-operative Packing & Produce Co., 268 Fed. 894. These cases stress the argu-

ment that to hold otherwise would practically annul the amendment; for inasmuch as it is ordinarily and usually unnecessary and uncommon in a creditor's bill to allege more than the debtor's inability to pay his obligations as they mature and the need of a receiver to conserve the assets, such appointments are rarely, if ever, based upon a finding of insolvency as defined in the bankruptcy act. United States v. Oklahoma (supra) is not decisive of this conflict for in that case insolvency within the Bankruptcy act was "not shown to exist."

39 We find it unnecessary in the instant case to decide this question because, assuming the interpretation of this clause of section 3a (4) as held in the later cases to be correct, we come to the consideration of a second question, namely:

Second. By the phrase "cases in which an act of bankruptcy is committed" in R. S., sec. 3466, is the assertion of the Government's claim to priority over other creditors limited, in addition to proceedings in which by action of the State, through insolvency or analogous laws, a debtor is divested of his property for its distribution to his creditors, to those under a Federal bankruptcy act when such exists, or does it extend as well to equity proceedings wherein a receiver has been appointed in circumstances sufficient to make such appointment an act of bankruptcy, even though no creditor has availed himself thereof within the time limit—four months, by section 3b of the bankruptcy act now in force—to throw the debtor into actual bankruptcy under a petition wherein the appointment of such receiver is alleged as the or one of the acts of bankruptcy committed?

Again there is conflict in the authorities. In Davis v. Pullen (supra) and Davis v. Miller-Fink Lumber Co. (supra), in each case reversing the District Court, priority was allowed, while in Equitable Trust Co. v. Conn. Brass & Mfg. Co., 290 Fed. 712 (C. C. A. 2), affirming the District Court, it was denied, in proceedings in equity under a creditor's bill. Davis v. Pullen, though not cited in the opinion, was discussed in the briefs filed in the Equitable Trust Co. case.

For the reasons stated by Judge Rogers at page 718 to 723, and especially by Chief Justice Shaw in Commonwealth v. Phoenix Bank, 11 Metc. 129, 151, quoted at page 722, we concur in the opinion expressed by the Second C. C. A., followed in Kennebec Box Co., Inc., v. O. S. Richardson Corp., 299 Fed. 871, now pending on appeal in the Second C. C. A.

While not decisive thereof, United States Fidelity & Guaranty Company v. Strain, 264 U. S. 570, affirming, without opinion and on the authority of United States v. Oklahoma (supra), Strain v. U. S. Fidelity & Guaranty Co., 292 Fed. 694 (C. C. A. 8), lends support to this conclusion. That case involved not a creditor's bill in equity but a proceeding by the State bank commissioner pur-

suant to State statute under which he placed a State bank examiner in charge of an insolvent bank and since then administered
40 its affairs. It is pointed out in the opinion that the decision in U. S. v. Oklahoma was based upon two distinct grounds; that while, unlike that case, the bank involved in the Strain case was insolvent in the bankruptcy sense when taken in charge, yet like that case, none of the particular acts required by section 3466 as evidencing such insolvency had occurred. Priority under sec. 3466 was denied, primarily for the reasons stated in the last sentence herein above quoted from U. S. v. Oklahoma. See, too, Anderson v. Myers, 296 Fed. 101, 103; certiorari granted 264 U. S. 578.

When the substance of this section was first enacted in 1789, there was no Federal bankruptcy act, and the provision was doubtless intended to give the Government priority in the distribution of a living debtor's assets in proceedings under the State insolvency laws. The provision would of course automatically extend to a bankruptcy case under a Federal statute, unless modified by such act or by some later enactment. Mr. Chief Justice Taft has expressed the view concurred in by two of his brethren that under the present bankruptcy statute the Government's right of priority extends only to claims for taxes. Sloan Shipyards v. U. S. Fleet Corporation, 258 U. S. 549, 574 (see, however, In re Atl. G. & P. S. Co., 289 Fed. 145). The majority of the court in the Sloan Shipyards case rested the decision on other grounds without agreeing or disagreeing with the view expressed by the Chief Justice.

That the Government, even without statutory provision, has a similar priority for taxes in equity proceedings, has been held by Judge Knox in the Southern District of New York, Liberty Mutual Ins. Co. v. Johnson Shipyards Corp., 300 Fed. 952, in that respect distinguishing the Equitable Trust Company case (supra).

The serious doubt raised by the Sloan Shipyards case (supra) as to the Government's priority in bankruptcy proceedings for any claim, except for taxes, but reinforces the arguments adduced against the allowance of the broader priority in equity proceedings available, but not availed of by a creditor to throw the defendant into bankruptcy.

A final question remains:

Third. Does section 10 of the Federal control act (40 Stat.,
41 c. 25, March 21, 1918)[1] prevent the Director General from

[1] "Carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall, upon motion of either party, be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

asserting Government priority over other creditors on claims arising out of the governmental war operations of the railroads?

It seems to us clear that this section was intended to subject the Director General in the operation of the various railway systems to the same rules of substantive civil law that had theretofore applied to the carriers. To give the Director General, with his manifold claims arising in the ordinary course of business, priority over all other creditors may work grave injustice. In some cases it might result in the Director General's taking all or nearly all the assets of the debtor. Such priority would give to the Director General a special and privileged position quite inconsistent with the underlying principles of the Federal control act: Director General v. Kastenbaum, 263 U. S. 221; Davis v. McCree, 299 Fed. 142, 146 (C. C. A. 6); and the marked tendencies of our public law; cf. The Pesaro, 277 Fed. 473; The Gloria, 286 Fed. 188. Judicial opinion as well as legislation is examining anew the proper privileges and immunities to be accorded the sovereign state, and in cases not clearly covered by statute or decision the correct solution is not to be found by the application of an abstract formula but by the most careful consideration of the public needs and the practical requirements of law in the modern industrial community.

Giving due regard to the expression of congressional policy of priority, on the one hand, and of a restriction to the rights that the carrier theretofore enjoyed, on the other hand, and on a careful balancing of conflicting interests, we believe that, especially in the light of the policy of the present bankruptcy act as interpreted by the Chief Justice (supra), priority must be denied to the Director General in this case. The question of priority is a matter of civil, compensatory law like the question of tort liability, considered in the Kastenbaum case (supra), and is quite different from the question of the nonliability of the Director
42 General, dealt with in Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554. It is also to be distinguished from the question whether the Director General is subject to the special State and Federal statutes of limitations. Dupont de Nemours & Co. v. Davis, 264 U. S. 456; Davis v. Corona Coal Co., 265 U. S. 19. The fact that the Director General has been declared not to have been subjected to the limitation statutes renders it all the more important that the declared legislative policy subjecting him to the usual rules of substantive civil law be given full effect. While our conclusion differs from that expressed in In re Hibner Oil Co., 264 Fed. 667 (C. C. A. 7); In re Tidewater Coal Exchange, 280 Fed. 648 (C. C. A. 2), as well as in Davis v. Pullen and Davis v. Miller-Link Lumber Co. (supra), in none of these cases does the court's attention appear to have been drawn to section 10 of the Federal control act.

Affirmed.

43 In United States Circuit Court of Appeals

Petition for and order allowing appeal

Filed Jan. 14th, 1925

The above-named plaintiff, James C. Davis, Director General, agent U. S. Railroad Administration, considering himself aggrieved by the order entered on November 11th, 1924, in the above-entitled proceeding, doth hereby appeal from the said order to the Supreme Court of the United States and prays that this, his appeal, may be allowed and that a transcript of the record and proceeding and papers upon which said order was made, duly authenticated, be sent to the Supreme Court of the United States.

CLAPPERTON & OWEN,
Attorneys for Plaintiff and Appellant.
Business address 1019 Michigan Trust Building,
Grand Rapids, Michigan.

Dated January 8th, 1925.

And now, to wit, on the 13th day of January, A. D. 1925, it is ordered that the appeal be allowed as prayed for.

A. C. DENISON,
Circuit Judge.

44 In United States Circuit Court of Appeals

Assignment of errors

Filed Jan. 14th, 1925

And now comes James C. Davis, Director General, agent U. S. Railroad Administration, plaintiff in the above-entitled cause, and files the following assignments of error upon which he will rely upon his prosecution of appeal in the above-entitled cause from the decree made by this honorable court on the 11th day of November, 1924:

(1)

The U. S. Circuit Court of Appeals, Sixth Circuit, erred in its decree of November 11th, 1924 in which it affirmed the order of the District Court of the United States for the Western District of Michigan, Southern Division, of September 15th, 1923, in which the said District Court overruled the exceptions of the said James C. Davis, claimant, to the report of the master in chancery, and confirmed the report of the master in chancery, and the said District Court of the United States for the Western District of Michigan, Southern Division, erred in its said order of September 15th, 1923, for the following reasons:

(1) That the claim of the said James C. Davis, Director
45 General, against the said Michigan Trust Company, receiver of Rathbone Manufacturing Company, was and is a preferred claim within the meaning of section 3466 of the Revised Statutes of the United States, and should have been allowed as a preferred claim, with priority as to payments over the ordinary claims filed against said estate.

(2) That the said claim of the said James C. Davis, Director General, is a preferred claim within the meaning of the said section 3466 of the Revised Statutes of the United States for the reason that at the time of the filing of the bill of complaint in the suit of the White Sewing Machine Company against the Rathbone Manufacturing Company, out of which suit this claim arises, the said Rathbone Manufacturing Company was insolvent and has committed an act of bankruptcy within the meaning of said section 3466, in that because of insolvency a receiver was put in charge of the said Rathbone Manufacturing Company.

(3) That at the time of the filing of the bill of complaint in the said suit of the White Sewing Machine Company versus the said Rathbone Manufacturing Company the said Rathbone Manufacturing Company was insolvent and committed an act of bank-
46 ruptcy within the meaning of said section 3466, U. S. Revised Statutes, in that, being insolvent, it applied for a receiver for its property.

(4) That the said Rathbone Manufacturing Company by its answer to the said bill of complaint and its consent to the appointment of a receiver, as prayed in said bill of complaint of the White Sewing Machine Company, made a voluntary assignment of all its property for the benefit of creditors within the meaning of the said section 3466, Revised Statutes of the United States.

(5) That the said James C. Davis, asserted priority for the sum of five hundred twenty-seven dollars and seventy-four cents ($527.74) of the claim filed for the reason that the merchandise therein referred to was converted by the said Rathbone Manufacturing Company and that this claim of preference was not passed upon by the master or by the said District Court, although said claimant is entitled to preference because of the fraudulent and unlawful acts of the said Rathbone Manufacturing Company in converting to its use this property within its custody.

Wherefore the appellant prays that said decree be reversed
47 and that the said United States Circuit Court of Appeals for the Sixth Circuit be ordered to enter a decree reversing the decision of the lower court in said cause.

CLAPPERTON & OWEN,
Attorneys for Appellant,
1019 Michigan Trust Building, Grand Rapids, Michigan.
Dated January 8th, 1925.

48 In United States Circuit Court of Appeals

Clerk's certificate

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of James C. Davis, Director General, etc., vs. The Michigan Trust Co., rec. of The Rathbone Mfg. Co., No. 4028, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof, together with the original citation.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 19th day of January, A. D. 1925.

[SEAL.] ARTHUR B. MUSSMAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(Indorsement on cover:)

File No. 30862. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 897. James C. Davis, Director General, agent U. S. Railroad Administration (Grand Rapids and Indiana Railroad), appellant, vs. Michigan Trust Company, receiver of Rathbone Manufacturing Company. Filed February 10th, 1925. File No. 30862.

Supreme Court of the United States

Order allowing certiorari

Filed April 13, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

39328—25——3

FILED
FEB 10 1925
WM. R. STANSBURY
CLERK

No. [redacted] 272

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (GRAND RAPIDS & INDIANA), PETITIONER

v.

THE MICHIGAN TRUST COMPANY, RECEIVER OF RATHBONE MANUFACTURING COMPANY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

By A. A. McLAUGHLIN,
GEORGE M. CLAPPERTON,
CHARLES M. OWEN,
Counsel for Petitioner.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1925

In the Supreme Court of the United States

JAMES C. DAVIS, DIRECTOR GENERAL, Agent, United States Railroad Administration (Grand Rapids & Indiana Railroad), petition, *v.* THE MICHIGAN TRUST COMPANY, Receiver of Rathbone Manufacturing Company, respondent.	No. 897

To the Honorable Supreme Court of the United States:

The petition of James C. Davis, Director General, Agent, United States Railroad Administration (Grand Rapids & Indiana Railroad), respectfully shows unto this Honorable Court:

I

That on the 6th day of December, 1919, the White Sewing Machine Company, a corporation under the laws of the State of Ohio, and William G. Renwick, of Chicago, Illinois, filed in the District Court of the United States for the Western District of Michigan, Southern Division, a bill in equity, asking for the appointment of a receiver of the Rathbone Manufacturing Company, a corporation under the laws of the State of Michigan. The bill

alleged generally that the defendant had borrowed from banks and from others over One hundred thousand dollars ($100,000) in order to pay its debts and losses in operation; that most of the commercial paper representing money borrowed had been endorsed by A. D. Rathbone, a stockholder; that the said A. D. Rathbone had refused to make further endorsements without which it was impossible for defendant to borrow further sums to pay its debts; that it had only about one hundred dollars ($100) cash on hand, was without credit and unable to pay its debts in the ordinary course of business; that there were practically no quick assets and that it was unable to collect its accounts receivable; that it indebtedness was one hundred forty thousand dollars ($140,000), a large portion of which was then due and that it had no money or means of raising money to pay such indebtedness. It was further alleged on information and belief, that as a going concern the value of defendant's assets exceeded the amount of its liabilities and that a stoppage of business would result in great depreciation of assets and make it impossible for defendant to pay its debts; that creditors were demanding payment; that judgments had been taken amounting to five thousand dollars ($5,000) and other suits commenced aggregating five thousand dollars ($5,000); that defendant was threatened with executions which would result in ruining the business and would almost certainly result in the insolvency of defendant and great loss to creditors.

It was further alleged that plaintiffs believed from information received, that if the assets of the corporation were properly handled and conserved by a receiver, creditors could probably be paid in full, and that there was a possibility that there might be a surplus for stockholders, but that otherwise there would be great loss to creditors; that the business was then being operated at a small profit and that in the opinion of plaintiff it might be profitably operated, but that suspension of operations and the breaking up of the business would result in great sacrifice of assets. The complainants prayed for an accounting between defendant corporation and its creditors, that the assets be marshaled and for a determination of creditors to be paid, and for the appointment of a receiver, and that the assets of defendants and the rights of creditors be ascertained, and the court fully administer the funds and property and enforce the rights of the creditors.

The answer of the defendant corporation was filed simultaneously with the complaint, admitted the allegations of the bill and consented to the appointment of a receiver. At the same time an order was made by the District Court appointing the respondent herein, the Michigan Trust Company, receiver of the defendant Company, and of all its property and assets, divesting the receiver with all the property and assets of defendant, with full power and authority to take into its possession all the property and assets of every kind and descrip-

tion belonging to the defendant, to collect the profits and revenues of all such property accruing to defandant, to institute lawsuits for the recovery of any damages or demands, to prosecute and defend any suits pending, to compound and settle with any debtor or creditor or persons responsible in any way for its property as the receiver should deem just and beneficial, and to sell, convey, and assign any and all of the property of the defendant subject to the supervision of the court, and in general vesting receiver with the usual rights and powers of receivers in such cases.

II

The total amount of ordinary claims of indebtedness allowed was actually two hundred and twenty-one thousand, two hundred and twenty-six dollars and sixty-one cents ($221,226.61), instead of one hundred and forty thousand dollars ($140,000) as was alleged in the bill of complaint. At the time of the filing of the petition for appointment of a receiver the Rathbone Manufacturing Company was, in fact, insolvent in that the aggregate of its property and assets was not at a fair valuation, sufficient in amount to pay its debts.

III

On the 15th day of May, 1920, the Director General of Railroads, United States Railroad Administration for the Grand Rapids & Indiana Railroad, filed proof of claim, which is the subject

of litigation in the present cause, which was composed of items of freight demurrage and switching charges on shipments of merchandise for the said Rathbone Manufacturing Company, amounting in the aggregate to the sum of three thousand nine hundred and fifty-three dollars and forty-six cents ($3,953.46), and also for the conversion of pig iron of the value of five hundred and twenty-seven dollars and seventy-four cents ($527.74), with interest on said items. The proof of claim was duly filed as a preferred claim under Article 3466 of the Revised Statutes of the United States. The portion of the said statute pertinent reads as follows:

> Whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall first be satisfied and the priority here established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof * * * as to cases in which an act of bankruptcy is committed.

This claim was duly allowed and given priority by the Master in Chancery, John S. Lawrence, who was later succeeded by Kirk E. Wicks as Master in Chancery.

IV

On April 18th, 1923, the receiver, respondent herein, Michigan Trust Company, filed objections to the allowance of the said claim as a preferred claim, objecting that the said claim should have

been allowed as an ordinary claim, not entitled to preference. On May 17th, 1923, the Master in Chancery filed a report in which the allowance of the claim as a preferred claim was set aside and the claim allowed as an ordinary claim for four thousand five hundred and twenty-two dollars and ninety-five cents ($4.522.95).

V

Petitioner herein, James C. Davis, Director General United States Railroad Administration, the claimant, on June 4th 1923, filed exceptions to the report of the Master for the reason that the Master in Chancery had held in his opinion that the claim was not entitled to priority, notwithstanding the fact that it was a claim due to the United States Government. The petitioner based its right to preference on the entire claim on the said Section 3466 of the Revised Statutes of the United States. The exceptions stated in substance that the report of the Master in Chancery was in error in its allowance of this claim as a preferred claim under the authority of the said priority statute, and stated that the allegations of the bill of complaint asking for a receiver for the Rathbone Manufacturing Company established insolvency within the meaning of the said Section 3466, Revised Statutes, thus establishing priority to the claim of the United States Government. The exceptions further stated that the allegations of this bill of complaint were admitted by the answer of the Rathbone

Manufacturing Company and that the record of the receivership with the District Court disclosed that the Rathbone Manufacturing Company was, in fact, insolvent both at the time of the filing of the bill of complaint and at the date of the filing of the Master's report and alleged that the report of the Master disallowing the said claim as a priority claim should be set aside, and an order entered, allowing the claim of the Director General entitled to priority. The said exceptions prayed that the District Court should fix a time for hearing its exceptions and for a review of the Master's recommendation; and also for an order allowing the claimant the entire amount of its claim as one entitled to priority because it was due to the United States Government.

VI

The cause was duly heard on the exceptions of the Director General of United States Railroad Administration, and on September 15th, 1923, the following decree was entered:

> This cause having come on to be heard upon the exceptions of James C. Davis, Director General, Agent, United States Railroad Administration (Grand Rapids & Indiana Railroad), to the report of the Master in Chancery relating to the claim of said James C. Davis, Director General, Agent; after argument thereof, and upon due consideration thereof, it is Ordered, that the exceptions of said claimant be and are

hereby overruled and that the report of the Master in Chancery be and is hereby confirmed: and that claimant be and is hereby allowed the benefit of an exception to this order. Dated September 13, 1923.

C. W. SESSIONS,
United States District Judge.

VII

That thereafter, to wit, on the 15th day of October, 1923, an appeal was allowed and perfected, and on the 15th day of February, 1924, a transcript of all the proceedings was filed in the United States Circuit Court of Appeals, Sixth Circuit, sitting at Cincinnati, and said cause was docketed in said Court of Appeals, entitled,

James C. Davis, Director General, Agent, United States Railroad Administration (Grand Rapids & Indiana Railroad), appellant v. The Michigan Trust Company, Receiver of Rathbone Manufacturing Company, appellee,

and numbered 4028 on said docket.

VIII

That the assignment of errors filed in said cause was as follows:

ASSIGNMENTS OF ERROR

1

That the claim of said James C. Davis, Director General, was, and is a preferred claim within the

meaning of Section 3466 of the Revised Statutes of the United States and should be allowed as a preferred claim, with priority as to payment over the ordinary claims filed against said Estate.

2

That said claim of said James C. Davis, Director General, is a preferred claim within the meaning of said Section 3466 of the Revised Statutes of the United States for the reason that at the time of the filing of the bill of complaint in said suit of the White Sewing Machine Company versus the Rathbone Manufacturing Company, said Rathbone Manufacturing Company was insolvent and has committed an act of bankruptcy within the meaning of said Section 3466 in that because of insolvency a receiver was put in charge of the said Rathbone Manufacturing Company.

3

That at the time of the filing of the bill of complaint the said Rathbone Manufacturing Company was insolvent and committed an act of bankruptcy within the meaning of the said Section 3466, U. S. Revised Laws in that being insolvent, it applied for a Receiver for its property.

That appellant asserted priority for $527.74 of the claim filed for the reason that the merchandise therein referred to was converted by the Rathbone Mfg. Co., and that this claim of preference was not passed upon by the Master, although appellant is entitled to preference because of the fraudulent and

unlawful acts of the Rathbone Manufacturing Company in converting to its use this property within its custody.

IX

That afterwards, to-wit, on the 9th day of October, 1924, the case came on to be heard before the Honorable Judge Denison, the Honorable Judge Mack and the Honorable Judge Sater in the Circuit Court of Appeals, and on the 11th day of November, 1924, a decree was entered in said cause by the Circuit Court of Appeals of the Sixth Circuit, affirming the said order of the District Court of the United States for the Western District of Michigan, Southern Division.

X

The questions and propositions of law involved in this case are substantially as follows:

Assuming that the Rathbone Manufacturing Company was actually insolvent at the time of the filing of the bill of complaint asking for a receiver, and at all times thereafter, in that its assets at a fair valuation were insufficient to pay its debts:

1. Is a claim of Director General, United States Railroad Administration, as a United States claim, entitled to priority over other claims against the receivership under Section 3466, Revised Statutes of the United States, on the ground that the said Rathbone Manufacturing Company by assenting and practically joining in the prayer for a receiver

made a general assignment for the benefit of creditors in a sense satisfying the said R. S. Section 3466?

2. Is an act of bankruptcy performed according to the provisions of said Section 3466 when a receiver is put in charge of the property of an insolvent corporation because the said corporation is unable to pay its debts in the ordinary course of business, though the bill asking for a receiver does not allege actual total insolvency?

3. The last clause of Section 3A (4) of the Bankruptcy Act gives as an act of bankruptcy, "because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state." Has an act of bankruptcy under this section been committed, although the bill asking for a receiver alleges merely an inability on the part of the debtor to pay its debts in the ordinary course of business, but does not allege in so many words that the debtor is actually insolvent, when the fact is that the debtor is actually insolvent?

4. Does Section 10 of the Federal Control Act (40 Stat., Mar. 21, 1918, c. 25) prevent the Director General from asserting government priority over other claims on claims arising out of the Governmental War operations of the railroads?

XI

There is a conflict of authority on all of these questions and petitioner is advised that the Supreme Court has never passed on these questions.

It is the contention of the petitioner that at the time that Section 3466 of the U. S. Revised Statutes was first enacted there was no bankruptcy act and that the cases interpreting that section have defined an act of bankruptcy to be performed when a debtor who is actually insolvent by some legal proceeding turns his property over in its entirety to other funds to be administered for the benefit of creditors.

The Circuit Court of Appeals of the Sixth Circuit puts the matter as follows, Vol. 2 Federal Reporter, 2nd Series, page 196:

> By the phrase of cases in which an act of bankruptcy is committed all in R. S. Section 3466, is the assertion of the government's claim of priority over other creditors limited, in addition to proceedings in which by action of the state through insolvency or analogous laws, a debtor is divested of his property for distribution of his property to those under a federal bankruptcy act, when such exists, or does it extend as well to equity proceedings wherein a receiver has been appointed in circumstances sufficient to make such appointment an act of bankruptcy, even though the creditor has availed himself thereof within the time limit—four months, by Section 3B of the Bankruptcy Act—to throw the debtor into actual bankruptcy under a petition wherein the appointment of such receiver is alleged as the, or one of the acts of bankruptcy, committed?

Again, there is conflict in the authorities.

The case of *Davis* v. *Pullen*, 277 F. 650 (C. C. A. 1), and *Davis* v. *Miller-Link Lumber Company*, 296 F. 649 (C. C. A. 5), holds squarely that the appointment of a receiver under the circumstances of the present case is an act of bankruptcy satisfying the priority act R. S. Section 3466.

The Circuit Court of Appeals in its decision cites the case of *Equitable Trust Company* v. *Conn. Brass Mfg. Co.*, 790 Fed. 712 (C. C. A. 2), as holding contrary, and in such split of authority follows the latter case. The court holds, in other words, that no priority can attach to a United States claim in an equity proceeding, at least unless the receiver has been put in charge of the insolvent's property, because of an allegation of actual insolvency. The court likewise expresses doubt as to whether in equity proceedings any United States claim other than claims for taxes would be accorded priority.

The other line of cases hold clearly that any debt due to the United States of whatever nature, is entitled to priority in an insolvent receivership.

XII

It is the claim of the petitioner that even under the Bankruptcy Act, under Section 3 A (4), that where a receiver has been put in charge of an insolvent's property under a bill of complaint alleging only inability to pay debts in the ordinary course of business, where the debtor is actually insolvent in

fact, an act of bankruptcy has been committed. This is the holding of the later line of cases discussed by the Circuit Court of Appeals in the present cause, Volume 2, Federal Reporter, second series page 196. The court also discusses an earlier line of cases opposing this holding and which deem it essential "that the appointment be based in whole or in part upon such insolvency" meaning that the bill asking for a receiver must allege actual insolvency.

The Circuit Court of Appeals found it unnecessary to decide this question although it is the claim of the petitioner that according to the later line of cases in the present cause, an act of bankruptcy under the Bankruptcy Act was committed, and hence that under R. S. Section 3466 the claim of the government is entitled to priority.

Although to the petitioner's best belief, it has prior to the decision of the circuit Court of Appeals in this cause been unanimously decided in a number of adjudicated cases that a claim of Director General of Railroads was a valid claim of the United States, hence entitled to priority like any other United States claim, yet the Circuit Court of Appeals held, and it is apparently the decisive point in the case that Section 10, Federal Control Act (40 Stat. March 1918, c. 25) prevents the Director General's claims from being in that class of government claims entitled to priority.

The decision of the Circuit Court in the present cause stands alone in so holding.

XIII

And your petitioner avers that the present case is one in which it is proper for this court to issue a writ of certiorari:

1. Because the Circuit Court of Appeals held that the claim of the petitioner is not entitled to priority under Section U. S. Revised Statutes 3466.

2. Because the questions of law involved herein have not been passed upon by this court.

3. Because the public interest and the interest of jurisprudence require a decision of this court upon the questions of law involved herein.

4. Because there is a conflict between the law as expounded by the Circuit Court of Appeals of the Sixth Circuit and other Circuit Courts.

XIV

Your petitioner is advised that said judgment of the Circuit Court of Appeals is final and is erroneous, and that this Honorable Court should require the case to be certified to it for its review and determination under the Act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision.

Your petitioner further avers that on to wit, the 13th day of January, 1925, an appeal from the Circuit Court of Appeals, Sixth Circuit, to the United States Supreme Court was allowed, but your petitioner is now advised that the present cause is ancillary to the original suit in equity, White Sewing Machine Company vs. Rathbone Manufactur-

ing Company, supra, and inasmuch as the jurisdiction of the District Court in that case depended upon diversity of citizenship alone that the jurisdiction in the present cause would probably follow that, and hence the decree of the Circuit Court of Appeals in this cause would be final according to the provisions of Section 128 of the Judicial Code of the United States.

XV

Your petitioner further avers that certified copy of the transcript of the record in this cause was duly forwarded to the Supreme Court with the petition for the appeal aforesaid, and your petitioner herein prays that said certified transcript of record may be considered as a part of this application for writ of certiorari according to Rule 37 of the Supreme Court.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued under the seal of the Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, demanding the court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in said cause to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Act of Congress, approved March 3, 1891, establishing the Circuit Court of Appeals and defining and regulating its jurisdiction, and

that the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court, and for such other and further relief as may seem proper.

And your petitioner will ever pray.

A. A. McLaughlin.
George Clapperton.
Charles M. Owen.

State of Michigan,
County of Kent, ss.

George Clapperton, being duly sworn, says that he is one of the attorneys and of counsel for James C. Davis, Director General, Agent, United States Railroad Administration (Grand Rapids & Indiana Railroad), and as such had personal charge for him of the case in the foregoing petition mentioned in the District Court of the United States for the Western District of Michigan, Southern Division, and in the United States Circuit Court of Appeals for the Sixth Circuit; that he has read the said petition by him subscribed; and that the facts therein stated are true to the best of his information and belief.

George Clapperton.

Sworn to and subscribed before me this 6th day of February, A. D. 1925.

Theoda S. Vincent,
Notary Public, Kent County, Michigan.

My commission expires 3–31–1925.

○

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No. 272

In the Supreme Court of the United States

OCTOBER TERM 1925

ANDREW W. MELLON, DIRECTOR GENERAL AND AGENT (SUBSTITUTED IN PLACE OF JAMES C. DAVIS), APPELLANT PETITIONER

v.

MICHIGAN TRUST COMPANY, RECEIVER OF RATHBONE MANUFACTURING COMPANY, RESPONDENT

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANT-PETITIONER

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1926

INDEX

	Page
Opinion below	1
Grounds of jurisdiction	1
Statement of the case	2
Assigned errors	7
Argument:	
Summary	8
I. The claim filed by the Director General was a claim on behalf of the United States	8–9
II. The claims filed by the Director General with the receiver were under Section 3466, United States Revised Statutes, entitled to priority, because the debtor when insolvent made a voluntary assignment of all his property for the benefit of his creditors and the receiver was invested with title thereto as trustee for said creditors and hence bound to give priority to said claims	8–13
Conclusion	14

CASES CITED

Bramwell v. *United States Fidelity & Guaranty Co.* (C. C. A.), 299 Fed. 705	14
Davis v. *Corona Coal Co.*, 265 U. S. 219	11–12
Davis v. *Michigan Trust Co.* (C. C. A.), 2 Fed. (2nd) 194	14
Davis v. *Miller Link Lumber Co.* (C. C. A.), 296 Fed. 649	9, 11–14
Davis v. *Pullen* (C. C. A.), 277 Fed. 650	9–14
Dupont de Nemours & Co. v. *Davis*, 264 U. S. 456	11
Equitable Trust Co. v. *Connecticut Brass & Manufacturing Corporation* (C. C. A.), 290 Fed. 712	14
In re Hibner Oil Co. (C. C. A.), 264 Fed. 667	9
In re Tidewater Coal Exchange (C. C. A.), 280 Fed. 648	9
United States v. *Butterworth Judson Corporation*, 46 Sup. Ct. Rep. 179	11–13

STATUTES

Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, 456	9

Revised Statutes, Section 3466..... 8-13

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 272

ANDREW W. MELLON, DIRECTOR GENERAL AND AGENT (substituted in place of James C. Davis), appellant-petitioner

v.

MICHIGAN TRUST COMPANY, RECEIVER OF RATHBONE Manufacturing Company, respondent

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN BEHALF OF APPELLANT-PETITIONER

OPINION BELOW

The opinion of the United States Circuit Court of Appeals is reported in 2 Fed. Rep. (2 Ed.) 194. (R. 23–28.)

JURISDICTION

The judgment to be reviewed is dated November 10, 1924. (R. 22–23.) Said judgment affirmed the order or decree of the United States District Court for the Western District of Michigan, Southern Division, disallowing priority to a claim filed with the Master in the above entitled receivership pro-

ceedings, by the Director General of Railroads, for transportation charges and for the conversion of a certain shipment by the debtor, all accruing to the said Director General out of the federal operation of railroads. (Decree District Court R. 18.)

On March 2, 1925, appellant-petitioner presented to this Honorable Court (Judicial Code Sec. 240), a petition for certiorari to said Circuit Court of Appeals, which petition was granted on April 13, 1925. (Memo. Opinion 45 Sup. Ct. Rep. 507.)

STATEMENT OF THE CASE

On the 6th day of December, 1919, the respondent, the Michigan Trust Company, was appointed receiver of the Rathbone Manufacturing Company, a corporation under the laws of Michigan, by the United States District Court for the Western District of Michigan, under a bill filed by the White Sewing Machine Company, a corporation under the laws of Ohio, and William G. Renwick of Chicago, Illinois.

Said bill, among other things, alleged that said Sewing Machine Company was a creditor of defendant in the amount of Three Thousand Dollars ($3,000) and that the said Renwick was a creditor for One Thousand Dollars ($1,000); that during a considerable portion of the time during the last several years defendant had been conducting business at a substantial loss; that it had borrowed from the banks in Grand Rapids and from its stockholders large sums of money, to wit, over One

Hundred Thousand Dollars ($100,000) in order to pay its merchandise accounts and other indebtedness and its losses in operation; that it was impossible for defendant to borrow further sums with which to meet its indebtedness; that it was unable to pay its debts in the ordinary course of its business as persons in trade usually do and are required to do; that its cash on hand was only One Hundred Dollars ($100) or thereabouts, and that it had practically no quick assets whatever; that it had accounts receivable of Eight Thousand Five Hundred and Forty Dollars ($8,540) or thereabouts but was unable to collect the same or any considerable portion thereof immediately; that the indebtedness of defendant, exclusive of its indebtedness on account of capital stock, amounts to One Hundred and Forty Thousand Dollars ($140,000) or thereabouts, of which a large portion was then due and payable, the balance being represented by notes of the defendant which would fall due at various times within the near future. On information and belief it was alleged that as a going concern the value of defendants assets exceeded the amount of its liabilities but that a stoppage or interference of its business would result in a great depreciation of the value of its plant and assets making it impossible that defendant could pay its debts; that judgments had been recently taken against defendant amounting in the aggregate to Five Thousand Dollars ($5,000) and various other suits com-

menced for indebtedness aggregating Five Thousand Dollars ($5,000) and that executions were threatened against its property; that if the assets of defendant were properly handled and conserved by a receiver that the creditors would probably be paid in full. The bill prayed that an accounting might be had and taken between said defendant and its creditors and its assets marshalled and that the Court determine what creditors were entitled to be paid therefrom respectively and that plaintiffs and other creditors might be paid what was justly due them and that a receiver might be appointed with the usual powers of receivers in equity in such causes; that the assets of defendant and the rights of plaintiffs and other creditors might be asserted and that the Court fully administer the funds and property of said defendant and enforce the liens and rights of all the creditors thereof as the same might be finally ascertained. (R. 1–5.)

On the day said bill was filed, to wit December 6, 1919, the defendant, the Rathbone Manufacturing Company, filed its answer to said bill admitting the truth of the allegations contained therein and consenting to the appointment of a receiver. (R. 5.)

Whereupon the said Court duly appointed the Michigan Trust Company, respondent herein, as such receiver and vested in it possession and title to all of the property of any and every kind and description belonging to said defendant with authority to continue the business of defendant until further order of the Court. (R. 5–6.)

On May 15, 1920, the then Director General of Railroads, predecessor to petitioner, filed proof of claim in said Court for certain transportation charges accruing to him as such Director General out of the federal operation of the railroads, said claim amounting to the sum of Three Thousand Nine Hundred and Fifty-Three Dollars and Forty-Six Cents ($3,953.46), together with a claim growing out of the conversion, by said Rathbone Manufacturing Company, of a certain shipment of pig iron of the value of Five Hundred and Twenty-Seven Dollars and Seventy-Four Cents ($527.74), total Four Thousand Five Hundred and Eighty-One Dollars and Twenty Cents ($4,581.20), with interest from September 29, 1919, and claimed priority therefor, because said indebtedness was due the United States. (R. 7–12.)

Said claims were duly allowed and given priority by the Master, John S. Lawrence, who later was succeeded by Kirk E. Wicks. Objections to the allowance of priority was duly filed by the receiver with the said Wicks who set aside the allowance of priority of said claims and allowed same as ordinary claims. (R. 12–13.) Exceptions to said order denying priority were duly taken by the Director General, same being filed June 4, 1923, in the District Court on the ground that the allegations of the bill of complaint asking for the appointment of a receiver established the insolvency of the Rathbone Manufacturing Company, which

allegations were admitted by the answer of defendant.

Before said exceptions were heard, to wit, on August 1, 1923, a stipulation admitting the insolvency of the defendant, Rathbone Manufacturing Company, was duly filed in said District Court, said stipulation being as follows, to wit:

IN UNITED STATES DISTRICT COURT—STIPULATION AS TO INSOLVENCY

Filed August 1, 1923

It is hereby stipulated and agreed by and between the receiver of said above named defendant corporation and the said claimant, by their respective attorneys, that at the time of the filing of the petition for the appointment of a receiver of said defendant corporation the said corporation was, in fact, insolvent in that the aggregate of all its property and assets was not at a fair valuation sufficient in amount to pay the debts of said corporation, the said receiver, however, not admitting that said insolvency was at that time shown by the books of said defendant, or was then known by defendant or by plaintiffs.

(dated) August 1, 1923.

(signed) KNAPPER, UHL & BRYANT,
Attorneys for Receiver.
CLAPPERTON & OWEN,
Attorneys for Director General of Railroads.

(R. 18.)

On September 15, 1923, the said Court overruled the exceptions to said report of said Master and confirmed his report denying priority to said claims. (R. 18.)

On October 13, 1923, appeal was duly allowed and duly perfected to the United States Circuit Court of Appeals for the Sixth Circuit. That afterwards, to wit, on October 9, 1924, the case was heard by said Court of Appeals and on the 11th day of November, 1924, a decree was entered in said cause by said Court of Appeals affirming the aforesaid order of the District Court. (R. 22-23.)

On the 2nd day of March, 1925, petitioner presented to this Honorable Court a petition for certiorari to the United States Court of Appeals for the Sixth Circuit, which petition was granted April 13, 1925.

ASSIGNED ERRORS

That the Court of Appeals erred in affirming the order of the District Court because

I

The claim of the Director General was a claim of the United States and was for a debt due the United States.

II

That at the time of the filing of the bill of complaint in the suit of the White Sewing Machine Company versus Rathbone Manufacturing Company the said Rathbone Manufacturing Company

was insolvent and by consenting to a decree appointing a receiver it thereby made a voluntary assignment for the benefit of its creditors within the meaning of Section 3466 of the United States Revised Statutes and hence said claim should have been allowed priority.

ARGUMENT

SUMMARY

I

The claims filed by the Director General were claims arising out of the operation of the railroads during Federal control and therefore the moneys due therefor were debts due to the United States.

An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity.

II

The claim of the Director General is based upon Section 3466 of the Revised Statutes of the United States which provides:

> Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts makes a voluntary assignment thereof, * * *

In the instant case it appears that the debtor, when it was insolvent, joined in an application for the appointment of a receiver of all its property and assets under a creditors bill, which prayed for a marshaling of those assets and the enforcement of the claims and rights of creditors under the orders of the Court. Such an act amounted to a general assignment for the benefit of its creditors and the vesting of the title to its property in the receiver as trustee for its creditors and bound to pay the debts due to the United States first out of the proceeds of such property.

I

The claim filed by the Director General was a claim on behalf of the United States

The Court below was of opinion that by reason of Section 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451,456, the Director General was prevented from asserting government priority over other creditors on claims arising out of the governmental war operation of the railroads. The Court conceded that its conclusion differed from that expressed in *In re Hibner Oil Co.* (C. C. A.), 264 F. 667; *In re Tidewater Coal Exchange* (C. C. A.), 280 F. 648; *Davis* v. *Pullen* (C. C. A.), 277 F. 650; and *Davis* v. *Miller-Link Lumber Co.* (C. C. A.), 296 F 649.

The Court in *In re Hibner Oil Co., supra,* in relation to a claim presented, in a bankruptcy pro-

ceeding, by the Director General of Railroads operating the New York Central Railroad said—

> The claim is by the United States for unpaid freight charges due from bankrupt on oil shipments made in August, 1918. over the New York Central Railroad, which was then being operated under Federal control. * * *

The Court then quoted Section 12 of said Act, March 21, 1918, which provided that—

> Moneys and other property derived from the operation of the carriers during federal control are hereby declared to be the property of the United States. * * * This claim for freight charges is " property " derived from operation of the carrier during federal control, and is thus the property of, and therefore a debt due to the United States.

The Court below in the instant case was impressed with the thought that to permit the Director General to have priority over other creditors on claims arising out of the federal operation of railroads would work a great injustice to such other creditors, saying—

> To give the Director General with his manifold claims arising in the ordinary course of business, priority over all other creditors may work great injustice. In some cases it might result in the Director General's taking all or nearly all the assets of the debtor.

This argument of apparent injustice in giving priority to such claims was urged in the *Pullen case, supra,* the Court saying—

> There is a certain obvious injustice in giving the United States when engaging in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents. But this is for Congress; we have no remedial power.

In *Davis* v. *Miller-Link Lumber Co., supra,* the claim of the Director General of Railroads was for the balance of a trackage charge arising out of an agreement granting the debtor the license and privilege of operating its logging trains over certain portions of a railroad then in the possession and control of the Director General. Said claim was given priority as an indebtedness in fact owed to the United States. These two latter cases were affirmed by this Court in *United States* v. *Butterworth-Judson Corporation,* 46 Sup. Ct. Rep. 179.

That a claim accruing out of the operation of the railroads while under federal control and possession by the Director General, as in the instant case, is presented by him on behalf of the United States in its governmental capacity would seem to be clearly settled by the decisions of this Court in the *DuPont De Nemours & Co.* v. *Davis,* 264 U. S. 456, and in *Davis* v. *Corona Coal Co.,* 265 U. S. 219.

Mr. Justice Sutherland in speaking for the Court in the former case and in referring to the Federal Control Act among other things said—

> Accurately speaking the Director General was not a carrier but an operator of carriers. Moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity.

In the case of *Davis* v. *Corona Coal Co., supra,* Mr. Justice Holmes in speaking for the Court in referring to the DuPont decisions said—

> The familiar rule was repeated that the United States should not be held to have waived any sovereign right or privilege unless it was plainly so provided. The provisions of Section 10 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451, 456, subjecting carriers "to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except," etc., rightly was said by the counsel for petitioner to do no more than subject operations of the carrier to existing laws, not to adopt from the States their several limitations to suits that this

DARK PAGE BLEED

government might bring while the United States applied no limitations of its own. The distinction in the statute between carriers and the government is pointed out in the above cited case.

II

The claims filed by the Director General with the receiver were under Section 3466 United States Revised Statutes, entitled to priority, because the debtor when insolvent made a voluntary assignment of all his property for the benefit of his creditors and the receiver was invested with title thereto as trustee for said creditors and hence bound to give priority to said claims

The facts in the instant case clearly bring it within the principle announced by this Court in the case of the *United States* v. *Butterworth-Judson Corporation, supra,* from which the following is a quotation, to wit:

> Taken in connection with its insolvency, now conceded, respondent's answer admitting the allegations of the complaint and its consent to the decree appointing receivers amounted to the handing over of all its property and business to the receivers to be administered, under the direction of the Court, as a trust fund to pay respondent's debts. In substance, the things done by respondent amounted to a voluntary assignment of all its property within the meaning of section 3466. The United States is entitled to priority.

EEDTHRU

Bramwell v. *United States Fidelity & Guaranty Co. supra,* affirming (C. C. A.) 299 F. 705; *Davis* v. *Pullen* (C. C. A.) 277 F. 650; *Davis* v. *Miller-Link Lumber Co.* (C. C. A.) 296 F. 649; *Cf. Equitable Trust Co.* v. *Connecticut Brass & Mfg. Corp.* (C. C. A.) 290 F. 712; *Davis.* v. *Michigan Trust Co.* (C. C. A.) 2 F. (2d) 194.

(This latter citation refers to the instant case.)

CONCLUSION

We conclude therefore that the claim presented to the Receiver as aforesaid by the Director General should have been given priority and we respectfully ask that the judgment of the Court of Appeals be reversed and the cause remanded.

Respectfully submitted,

A. A. McLAUGHLIN,
SIDNEY F. ANDREWS,
Attorneys for Appellant-Petitioner.

(16)

Office Supreme Court,
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No. 272

In the Supreme Court of the United States

OCTOBER TERM, 1925

ANDREW W. MELLON, DIRECTOR GENERAL AND AGENT (SUBSTITUTED IN PLACE OF JAMES C. DAVIS), APPELLANT-PETITIONER

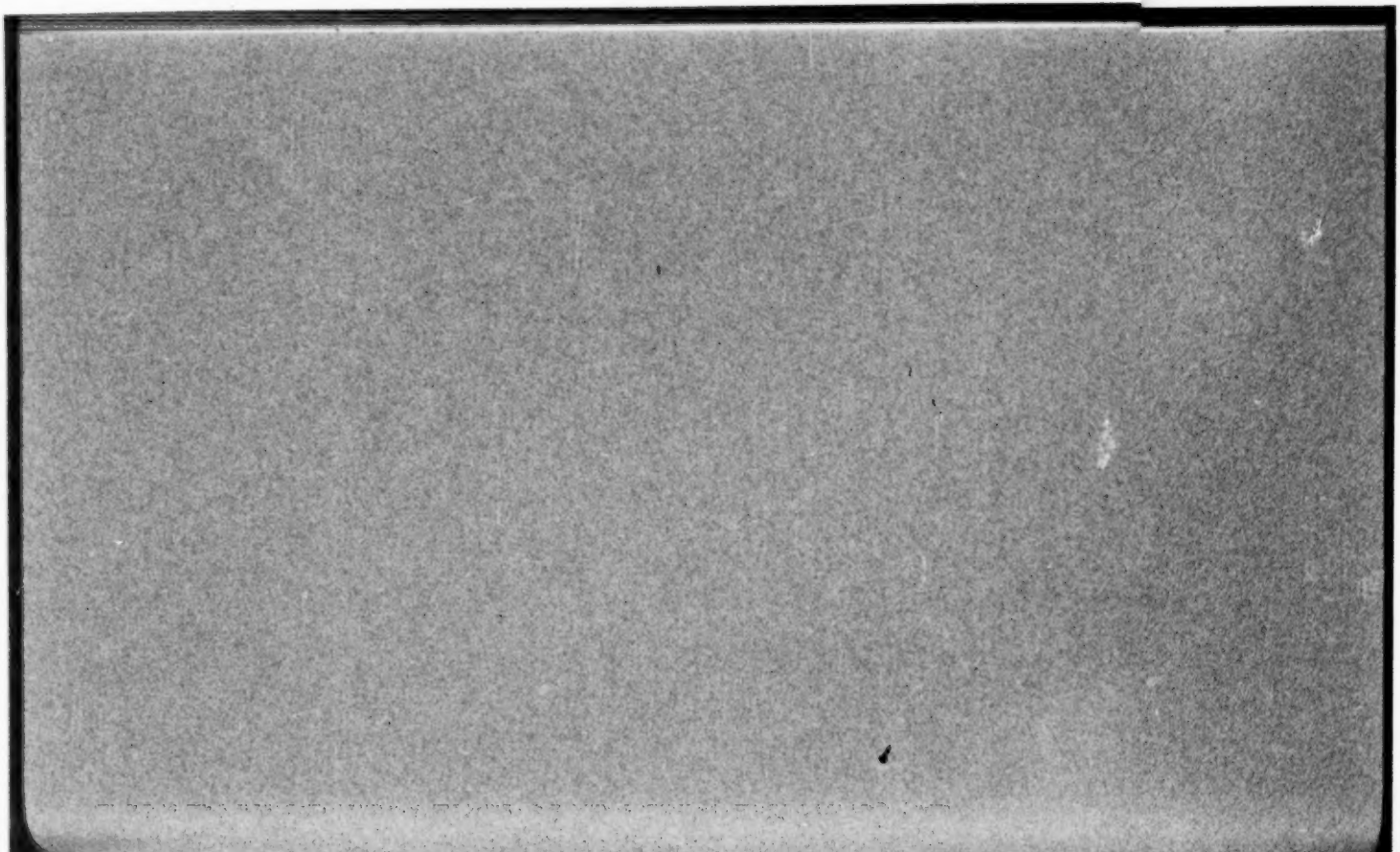
v.

MICHIGAN TRUST COMPANY, RECEIVER OF RATHBONE MANUFACTURING COMPANY, RESPONDENT

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1926



INDEX

Argument: Page

Summary 1

I. The claim filed by the Director General was a claim on behalf of the United States 1, 2

II. The United States did not surrender its sovereignty in regard to the prosecution of suits by virtue of Section 10 of the Federal Control Act (40 Stat. 451, 456) 1, 4

III. Priorty is asserted under Section 3466, U. S. Revised Statutes 2, 5

CASES CITED

Davis v. *Corona Coal Co.*, 265 U. S. 219 2

E. I. du Pont de Nemours & Co. v. *Davis*, 264 U. S. 456 3

STATUTES

Federal Control Act of March 21, 1918, c 25, 40 Stat. 451, 456 .. 1, 2, 4

Revised Statutes, Section 3466 ..... 2, 5, 6

Transportation Act of 1920, 41 Stat. 456 5

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 272

ANDREW W. MELLON, DIRECTOR GENERAL AND AGENT (substituted in place of James C. Davis), appellant-petitioner

v.

MICHIGAN TRUST COMPANY, RECEIVER OF RATHBONE Manufacturing Company, respondent

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

ARGUMENT

SUMMARY

I

If, as is conceded by appellee, the United States would be entitled to priority, its representative the Director General suing on its behalf is likewise so entitled.

II

Section 10 of the Federal Control Act (40 Stat. 451, 456) merely subjected operations of the carriers to existing laws. The Director General was

not included in the term "carriers." The Government thereby did not surrender its sovereignty in regard to the prosecution of suits.

III

The Director General is not asserting priority under the general prerogative belonging to the United States in its sovereign capacity but does so under the express language of Section 3466, U. S. Revised Statutes.

I

The claim for which priority is sought is for money due the United States

Respondent admits that under the decisions of this Court and the record in this case the Director General of Railroads would be entitled to priority, under Section 3466 of the U. S. Revised Statutes, for the debt here sued for unless barred from such right by the provisions of Section 10 of the Federal Control Act of March 21, 1918 (c. 25), 40 Stat. 451, 456.

Said Act is entitled:

> An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.

As was said by Mr. Justice Holmes in delivering the opinion of this Court in *Davis* v. *Corona Coal Co.*, 265 U. S. 219:

> The provisions of Sec. 10 of the Federal control act, of March 21, 1918, c. 25, 40 Stat.

> 451, 456 " subjecting carriers to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law, except," etc., rightly was said by the counsel for the petitioner to do no more than subject operations of the carriers to existing laws * * *. The distinction in the statute between carriers and the Government is pointed out in the above-cited case. (*E. I. DuPont De Nemours & Co.* v. *Davis*, 264 U. S. 456.)

In the Du Pont case it was held that limitation of actions by " carriers " for recovery of charges was not applicable to the Director General and that unless plainly so provided the United States did not waive any sovereign right in taking over the railroads.

In the opinion of the Court delivered by Mr. Justice Sutherland in the said case it was said (p. 462):

> In taking over and operating the railroad systems of the country, the United States did so in its sovereign capacity, as a war measure, "under a right in the nature of eminent domain" (authorities cited), and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States. Section 12, 40 Stat. 457. An action by the Director General to recover upon a liability arising out of such

control is an action on behalf of the United States in its governmental capacity, *Ches. & Del. Canal Co.* v. *United States* 250 U. S. 123, 126. [Etc.]

II

By section 10 of the Federal Control Act (40 Stat. 451, 456) the United States did not surrender its sovereignty in regard to the prosecution of suits for causes of action arising out of the Federal control of railroads

By Section 10 of the Federal Control Act, quoted and relied on by respondent, the Government consented to suits against it concerning matters growing out of its operation of the railroads. In other words, the Government consented to be subject, in the operation of such railroads, to the same liabilities as the owners would have been subject if operating their own properties but in so doing the Government did not surrender its sovereignty in other respects. Merely consenting to be sued and to be liable in certain cases will be strictly construed and will not be extended beyond the fair construction of the language used in announcing such surrender of sovereignty. The consent of the Government to assume certain liabilities while operating the railroads and consenting to be sued for the enforcement of such liabilities can not be construed as a surrender of its sovereignty in connection with the bringing or prosecution of suits.

The claim sued on in the case at bar is for moneys earned by the Government while operating

the railroads in its sovereign capacity and the suit is by it through the Director General in the same capacity. There is nothing in the Federal Control Act or in the Transportation Act of 1920 (41 Stat. 456) indicating any surrender of the sovereignty of the Government concerning the bringing or prosecution of suits for the conservation or protection of the Government assets. The fact that the Government during Federal operation and for a limited time thereafter subjected itself to the liabilities of a carrier can not affect the right of the Government to sue for the collection of moneys accruing while it was operating the railroads, said moneys being expressly declared to be the property of the Government, nor deprive the Government of priority granted in the distribution of the assets of an insolvent concern as provided in Section 3466.

The decisions referred to by respondent holding that under the present Bankruptcy Act the Government is not entitled to priority except for taxes are based on the ground that such statute excluded other debts due the Government and hence priority claimed was not given it by law.

III

The assertion of priority is by virtue of section 3466 U. S. Revised Statutes

As we understand respondents' argument they erroneously assume that in the case at bar the Director General is attempting to assert priority under the general prerogative belonging to the

United States in its sovereign capacity, whereas the fact is that the priority here sought is expressly averred to be by virtue of Section 3466, U. S. Revised Statutes, which provides:

> Wherever any person indebted to the United States is insolvent, * * * the debts due to the United States shall first be satisfied [etc.].

Insolvency is admitted and we have attempted to show that the indebtedness sued for is due the United States and that a suit for such indebtedness by the Director General is a suit on behalf of the United States; the conditions required being satisfied, priority is established.

The other cases cited merely hold that by Section 10 of the Federal Control Act the United States had waived its immunity to suits for liabilities growing out of the operation of the railroads to the same extent as though it were a railway corporation operating as a common carrier. By submitting itself to be sued, however, the Government did not surrender its right or power to sue or any right incident thereto.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1925.

No. 272.

ANDREW W. MELLON, Director General and Agent (Substituted in place of James C. Davis),
Appellant-Petitioner,

v.

MICHIGAN TRUST COMPANY, Receiver of Rathbone Manufacturing Company,
Respondent.

On Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN BEHALF OF APPELLEE-RESPONDENT.

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INDEX.

	Page
STATEMENT OF THE CASE	1
ARGUMENT	2-12
The Priority Statute	2
Did debtor make an assignment for creditors under Section 3466?	2
The Director General is not entitled to assert government priority	3
CONCLUSION	12

Cases Cited.

Bramwell v. United States Fidelity & Guaranty Co., 46 Sup. Ct., 176	7
Davis v. Corona Coal Co., 265 U. S., 219	9
Davis v. Michigan Trust Co. (C. C. A., 6), 2 Fed. (2nd), 194	3
Davis v. Miller-Link Lbr. Co., 296 Fed., 649 (C. C. A., 5)	7, 8
Davis v. Pullen, 277 Fed., 650 (C. C. A., 1)	7
Davis, Federal Agent, v. Pringle, 45 Sup. Ct. Rep., 549	6, 11
Director General v. Kastenbaum, 263 U. S., 25	4, 8
DuPont De Nemours & Co. v. Davis, 264 U. S., 456	9, 11
Empire Refining Co. v. Davis, Dir. General, 6 Fed. (2nd), 305 (D. C. Okla.)	9
Hibner Oil Co., In Re, 264 Fed., 667 (C. C. A., 7).	7
Price v. United States, 46 Sup. Ct., 180	7, 11
Sloan Shipyards v. U. S. Fleet Corporation, 258 U. S., 549	5

Tidewater Coal Exchange, In Re, 280 Fed., 648 (C. C. A., 2) 7
United States v. Butterworth-Judson Corporation, 46 Sup. Ct. Rep., 179 ..... 3, 7
United States v. Canal Bank, 25 Fed. Cas., 277.... 10
United States v. Oklahoma, 261 U. S., 253..... 11
Wilson & Co. v. Davis, Dir. General, 8 Fed. (2nd), 484 (C. C. A., 7) 9
Wyoming Sugar Co. v. Davis, 7 Fed. (2nd), 622 (D. C. Wyo.) 9

Statutes.

Revised Statutes, Section 3466 ..... 1- 2
Federal Control Act of March 21, 1918, C. 25, 40 Stat. 451, 456 3

Supreme Court of the United States

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No. 272.

ANDREW W. MELLON, Director General and Agent (Substituted in place of James C. Davis),
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v.

MICHIGAN TRUST COMPANY, Receiver of Rathbone Manufacturing Company,
Respondent.

On Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN BEHALF OF APPELLEE-RESPONDENT.

STATEMENT OF THE CASE.

We regard the statement of the case as set forth in brief for appellant-petitioner as adequate and sufficient for an understanding of the questions involved, and therefore proceed at once to the argument.

ARGUMENT.

The Priority Statute.

The *Priority Statute, Section 3466 of the Revised Statutes of the United States,* provides:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

When the writ of certiorari in this case was granted on April 13, 1925 *(45 Sup. Ct. Rep., 507),* it was an open question in this court whether the acts done by the debtor, Rathbone Manufacturing Company, in this case made it one "in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof," or one "in which an act of bankruptcy is committed," within the meaning of the Priority Statute.

This question is now apparently closed against further argument by reason of the decision of *United States v. Butterworth-Judson Corporation, 46 Sup. Ct. Rep., 179* (decided January 11, 1926). This court there held, under facts similar to this case, that a corporation in fact insolvent, but not alleged nor admitted to be so, which admits the allegations of a creditor's bill setting forth its inability to meet maturing obligations, and consents to the appointment of a receiver, thereby hands over its property and business to the receiver to be administered as a trust fund to pay its debts, and in effect makes a voluntary assignment of all its property within the meaning of Section 3466.

This brings us to the only remaining question covered by the assignments of error in this case, namely, whether Section 10 of the Federal Control Act of March 21, 1918 (40 Stat., C. 25, 451, 456) prevents the Director General from asserting government priority over other creditors on claims arising out of the governmental war operations of the railroads.

The Director General Is Not Entitled To Assert Government Priority.

Section 10 of the Federal Control Act (40 Stat., C. 25, 451, 456, Act of March 21, 1918) provides:

> "Carriers, while under federal control, shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except insofar as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the president. Actions at law or suits in equity may be brought by and against

> such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality of agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of congress or official order or proclamation relating thereto shall, upon motion of either party, be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control."

In reaching its conclusion that Section 10 of the Federal Control Act prevented the Director General from asserting government priority in respect to claims arising out of the operation of the railroads during federal control, the court below said, *2 Fed. (2nd), 194, 197* (R., pp. 27-28):

> "It seems to us clear that this section was intended to subject the Director General in the operation of the various railway systems to the same rules of substantive civil law that had theretofore applied to the carriers. To give the Director General with his manifold claims arising in the ordinary course of business, priority over all other creditors may work grave injustice. In some cases it might result in the Director General's taking all or nearly all the assets of the debtor. Such priority would give to the Director General a special and privileged position quite inconsistent with the underlying principles of the Federal Control Act; *Director General v. Kasten-*

baum, 263 U. S., 25; Davis v. McCree, 299 Fed., 142, 146 (C. C. A., 6); and the marked tendencies of our public law; cf. *The Pesaro, 277 Fed., 473; The Gloria, 286 Fed., 188.* Judicial opinion as well as legislation is examining anew the proper privileges and immunities to be accorded the sovereign state, and in cases not clearly covered by statute or decision the correct solution is not to be found by the application of an abstract or formula but by the most careful consideration of the public needs and the practical requirements of law in the modern industrial community.

Giving due regard to the expression of congressional policy of priority, on the one hand, and of a restriction to the rights that the carrier theretofore enjoyed, on the other hand, and on a careful balancing of conflicting interests, we believe that, especially in the light of the policy of the present Bankruptcy Act as interpreted by the Chief Justice *(supra)*, priority must be denied to the Director General in this case."

In speaking of "the policy of the present Bankruptcy Act as interpreted by the Chief Justice," the court is referring to the case of *Sloan Shipyards v. U. S. Fleet Corporation, 258 U. S., 549,* in which the majority of the court denied priority in a bankruptcy proceeding set up by the Emergency Fleet Corporation, on the ground that, even if the United States would be entitled to priority, the Emergency Fleet Corporation was a separate entity, and its claim for priority could not be sustained. The majority intimated no opinion on the question whether a debt to the United States other than for taxes would have been entitled to priority. The Chief Justice and Justices Van Devanter and Clarke dissented from the reasoning of the majority, but as to the claim to priority concurred in the result in this langauge used by the Chief Justice:

> "As to the preference claimed against a bankrupt in No. 526 by the Fleet Corporation, I concur in the conclusion of the court that it cannot be allowed under the statute as to preferences in bankruptcy, because I do not think it extends to claims of the United States except those for taxes."

It is significant that the view taken in this case by the Chief Justice and Justices Van Devanter and Clarke was later adopted by the entire court in *Davis, Federal Agent, v. Pringle, 45 Sup. Ct. Rep., 549* (May 25, 1925), where the court held that claims due the United States other than taxes are not entitled to priority under the present Bankruptcy Act.

Mr. Justice Holmes, in speaking for the court, said, page 550:

> "Public opinion as to the peculiar rights and preferences due to the sovereign has changed. We agree with the view of this point taken by the Chief Justice and Justices Van Devanter and Clarke in *United States Shipping Board Emergency Fleet Corporation v. Wood, 258 U. S., 549, 574; 42 S. Ct., 386; 66 L. Ed., 762*, at a time when it was not necessary for the majority to speak upon it. The priority claimed by the United States is not given to it by the law."

This reasoning and conclusion adds new emphasis to the observation of the Circuit Court of Appeals in the instant case, that "judicial opinion as well as legislation is examining anew the proper privileges and immunities to be accorded the sovereign state," and thus confirms its decision that the Director General should be denied the right to assert government priority.

Section 10 of the Federal Control Act was not involved in either *United States v. Butterworth-Judson Corporation, 46 S. Ct., 179* (January 11, 1926); or in *Bramwell v. United States Fidelity & Guaranty Co., 46 S. Ct., 176* (decided the same day), or in *Price v. United States, 46 S. Ct., 189* (decided the same day). In the first case the claim of the government was for breach of a war contract for the manufacture of picric acid *(United States v. Butterworth-Judson Corporation, 297 Fed., 971 (C. C. A., 2); 45 S. Ct., 338; 267 U. S., 387).* In the *Bramwell case*, the claim was made by the bonding company as assignee of the United States under a bond given by the bank to the United States to secure the payment of a deposit made by the superintendent of an Indian reservation. In the *Price case* the government's claim was for income taxes and unpaid customs duties. None of these cases therefore have any bearing upon the rights of the Director General in a claim arising out of the government operation of railroads.

It is recognized by the Circuit Court of Appeals in the present case that its conclusion on the point under discussion differs from that expressed in *In Re Hibner Oil Co., 264 Fed., 667 (C. C. A., 7); In Re Tidewater Coal Exchange, 280 Fed., 648 (C. C. A., 2); Davis v. Pullen, 277 Fed., 650 (C. C. A., 1); and Davis v. Miller-Link Lumber Co., 296 Fed., 649 (C. C. A., 5).*

It is pointed out, however, that "in none of these cases does the court's attention appear to have been drawn to Section 10 of the Federal Control Act."

In *In Re Hibner Oil Co.* and *In Re Tidewater Coal Exchange*, claims were for unpaid freight charges for shipments by railroad under federal control and were

held entitled to priority under Bankruptcy Act, Section 64-b (5) and Section 3466, Revised Statutes, without discussion of Section 10 of the Federal Control Act. Section 10 likewise received no discussion in *Davis v. Miller-Link Lumber Co.*, where a claim for trackage charges was held entitled to priority. In *Davis v. Pullen*, freight charges were held entitled to priority without discussion of Section 10. It is noteworthy that in the *Pullen case* the court admitted the weight of the argument, that the enterprise of the government under its war powers in taking over and operating the railroads, was not within the contemplation of congress in enacting the Priority Statute, and recognized the injustice of allowing priority in such a case *(277 Fed., 650, 655)*:

> "This argument has weight. There is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even though under war powers, superior rights over other creditors bearing like relations to the insolvents."

In other decisions where Section 10 of the Federal Control Act has been interpreted in cases involving matters of "civil, compensatory law" (of which the instant case is typical), the view is consistently adhered to that the act is to be regarded as subjecting the Director General to the same rights and liabilities that existed as to common carriers before its enactment.

In *Director General v. Kastenbaum, 263 U. S., 25*, it was held in an action against the Director General for false imprisonment:

> "The government under Section 10 in a case of false imprisonment, stands exactly as if it were

a railway corporation operating as a common carrier."

In *Wilson & Co. v. Davis, Director General, 8 Fed. (2nd), 484 (C. C. A., 7, October, 1925)*, the court held that the plaintiff, a shipper, was entitled to interest on a reparation award made by the Interstate Commerce Commission on excessive freight charges collected during federal control, but was not entitled to costs and attorneys' fees, as the latter was not an item of damage while the former had been uniformly allowed and recovered before the Transportation Act was enacted. The court said, after quoting Section 10 of the Federal Control Act and Section 206 of the Transportation Act:

> "A fair interpretation of these statutes, we think, demands a construction which continued (so far as possible) all existing rights, liabilities and obligations of shippers and carriers."

Of like import are *Wyoming Sugar Co. v. Davis, 7 Fed. (2nd), 622 (D. C. Wyo., August 15, 1925)*, and *Empire Refining Co. v. Davis, Director General, 6 Fed. (2nd), 305 (D. C. Okla., March, 1925)*.

It is true that in *DuPont De Nemours & Co. v. Davis, 264 U. S., 456*, and *Davis v. Corona Coal Co., 265 U. S., 219*, this court held that in taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, but we submit that the right of the Director General to assert government priority is not thereby established. It has long been settled that in a case of this kind where the government is asserting priority in payment of debts (not taxes), the right of priority depends exclusively upon the statute and does not rest upon any general

prerogative belonging to the government in its sovereign capacity. The right to priority in this country is not an attribute of sovereignty but is a creature of statute. In *United States v. Canal Bank, 25 Fed. Cas., pages 277, 278; 3 Story 79*, Mr. Justice Story, sitting in the circuit court in 1844, said:

> "In the first place, whether the United States have any priority, or privilege, in respect to the debts due to them by their debtors, over the debts due to private persons, so as to entitle them to a prior satisfaction, upon any judgments obtained against their debtors, out of the property attached, before other attaching creditors, whose attachments are of an earlier date. * * * It has long since been settled, by the solemn adjudications of the supreme court, that the United States do not possess any general right of priority or privilege over private creditors, for the satisfaction of the debts due to them, founded upon any general prerogative, belonging to the government in its sovereign capacity, but that all the priority or privilege, which the government is at liberty to assert, is or must be founded upon some statute, passed by congress, in virtue of its constitutional authority. This was expressly so held in *U. S. v. Fisher, 2 Cranch (6 U. S.), 358, 396 (2 L. Ed., 304)*, and the doctrine has ever since been strictly adhered to. *U. S. v. Hooe, 3 Cranch (7 U. S.), 73 (2 L. Ed., 370); Prince v. Bartlett, 8 Cranch (12 U. S.), 431 (3 L. Ed., 614); Thelusson v. Smith, 2 Wheat. (15 U. S.), 396 (4 L. Ed., 271); U. S. v. Howland, 4 Wheat. (17 U. S.), 108 (4 L. Ed., 526); Conard v. Atlantic Ins. Co., 1 Pet. (26 U. S.), 387 (7 L. Ed., 189).* It is not here, as it is in England, where the sovereign is entitled, in virtue of his prerogative, to a priority over private creditors, for satisfaction of the debts due to the crown. *Com. Dig. 'Prerogative,' D. 86; Id. 'Debt,' G. 8, G. 9.*"

In *United States v. Oklahoma, 261 U. S., 253, 259; 43 S. Ct., 295 (67 L. Ed., 638):*

> "The claim of the United States to the asserted priority rests exclusively upon the statute."

In *Price v. United States, 46 S. Ct., 180* (decided January 11, 1926), Mr. Justice Butler said:

> "The claim of the United States does not rest upon any sovereign prerogative." * * *

Thus, on the question of priority, it becomes immaterial whether, as stated in *DuPont De Nemours & Co. v. Davis, 264 U. S., 456,* the government in taking over the operation of the railroads of the country, did so in its sovereign capacity. The question depends solely upon the language of the Priority Statute and that of Section 10 of the Federal Control Act.

It is clear that at the time of the decision in *Davis v. Pringle, 45 S. Ct., 549* (May 25, 1925), this court did not consider that the question of the Director General's right to priority had been settled by any of its previous decisions. Three cases were there before the court on writs of certiorari, two of them involving claims for freight, storage and demurrage charges of the Director General accruing in the operation of railroads under federal control, which claims were proved in bankruptcy proceedings by the federal agent and for which priority was asserted on the ground that they were debts due to the United States of the character given priority by Section 3466. The court found that by reason of the Bankruptcy Act, the government was not entitled to priority, leaving undecided the question of the right of the Director General to assert government priority and indicating that the latter question would require additional inquiries:

> "All the three cases depend upon the question whether the government has a right to the priority it claims. If that is denied the additional inquiries that would be necessary before the federal agent could prevail in the railroad cases need not be gone into. Therefore we take up that first."

We think it is not an unwarranted assumption that the further statement of Mr. Justice Holmes in that case that "*public opinion as to the peculiar rights and preferences due to the sovereign has changed*" has a significance beyond its application to the case there under consideration.

CONCLUSION.

We submit that the language of Section 10 of the Federal Control Act and the policy it was plainly designed to express, the obvious injustice that would result to other creditors if the Director General were given the privileged position of a preferred creditor, and the drift of public sentiment away from an enlargement of the rights and privileges of the sovereign, are all valid reasons why the judgment of the lower court was correct, and we respectfully submit that its decision denying priority should be affirmed.

Respectfully submitted,

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(12)

SUPREME COURT OF THE UNITED STATES.

No. 272.—October Term, 1925.

Andrew W. Mellon, Director General, Agent U. S. Railroad Administration (Grand Rapids and Indiana Railroad), Appellant and Petitioner, *vs.* Michigan Trust Company, Receiver of Rathbone Manufacturing Company. } Appeal from and on Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 24, 1926.]

Mr. Justice McReynolds delivered the opinion of the Court.

Creditors of the Rathbone Manufacturing Company filed a bill against it in the United States District Court, Western District of Michigan, wherein they alleged its inability to pay lawful debts in due course, etc., and asked for a receiver. Answering, the corporation (which was, in fact, insolvent) admitted the allegations and gave consent to the relief prayed. Thereupon, the Michigan Trust Company was appointed receiver, took possession of the property and entered upon administration of the trust.

The Director General of Railroads presented claims for transportation charges and conversion of a shipment of pig iron. He asked priority of payment, which was denied by both the trial court and the Circuit Court of Appeals. 2 Fed. (2d) 194.

As pointed out in *United States* v. *Butterworth-Judson Corporation*, — U. S. — [January 11, 1926], the things done by the Rathbone Manufacturing Company amounted, in substance, to a voluntary assignment of all its property within the meaning of R. S. § 3466.* Consequently, if the Director General is entitled to the

*Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

priority granted to the United States by that section, the judgment below must be reversed. But it is said here, and was held below, that such priority is inhibited by the provisions of § 10, Act of March 21, 1918, c. 25, 40 Stat. 451, 456, which provides—

> That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except insofar as may be inconsistent with the provisions of this Act or any other Act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any Act of congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control.

Under *Davis* v. *Pringle*, 268 U. S. 315, if the estate of the Rathbone Manufacturing Company were being administered under the Bankruptcy Act the claims of the Director General would not be entitled to preference. It is also plain, under *Bramwell* v. *United States Fidelity & Guaranty Co.*, — U. S. —; *Price, Receiver* v. *United States*, *id.* —; and *United States* v. *Butterworth-Judson Corporation*, *supra*, [January 11, 1926] that, in proceedings like the present one, debts due directly to the United States, nothing else appearing, are ordinarily entitled to priority under R. S. § 3466. Decision of this cause, therefore, must turn upon the effect to be given § 10, Act of 1918, *supra*.

All agree that the rights of the Director General rest upon statutory provisions, and not upon any sovereign prerogative of the United States. In taking over and operating the railroads, the

United States acted in their sovereign capacity. *DuPont De Nemours & Co.* v. *Davis*, 264 U. S. 456, 462. But it was for Congress to determine whether or not claims arising out of such operation should have priority when the debtor made a voluntary assignment. In cases of bankruptcy the statute then in force prohibited any preference.

In some matters, at least, under § 10, the United States stand exactly as if they were a railroad corporation operating as a common carrier. *Director General* v. *Kastenbaum*, 263 U. S. 25, 28. As said in *Davis* v. *Pullen*, 277 Fed. 650, 655, "there is a certain obvious injustice in giving the United States when engaged in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents." And we think that the indicated purpose of Congress will be best carried out by construing the relevant statutes, so far as may be, with the general intent to preserve the substantive rights of all parties concerned as they would have existed but for federal control.

Section 10 subjected the Director General, as an operator of common carriers, to the laws theretofore applicable to them, except when inconsistent with some provision of the federal control acts or an order of the President, and forbade him to defend, in any suit against him as such operator, upon the ground that he was an instrumentality or agency of the federal government. In the circumstances presented by this record, it is reasonable to say that the statute confined his substantive rights to those which a carrier would have had, and prohibits him, as though he were an actual defendant in a suit, from resisting the demands of others for equal distribution of the insolvent's assets, under the commonly-applied rule, upon the ground that he is an instrumentality of the federal government. To permit the claimed preference, we think, would conflict with the spirit and broad purpose of the statute. These become plain enough upon consideration of the just ends which Congress had in view together with the recent policy, revealed by the Bankruptcy Act, in respect of priorities.

The cause is properly here on the writ of certiorari. The appeal was improvidently allowed by the circuit judge, and is dismissed.

The decree below is

Affirmed.